Rec'd. Oct 29.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 242.

THE PACIFIC RAILROAD (OF MISSOURI),
Appellant,

against

GEORGE E. KETCHUM AND OTHERS,
Appellees.

Brief Filed by Appellant's Counsel upon Jurisdiction of Circuit Courts under Act of March 3d, 1875, in Cases 207, 210 and 500. October Term, 1878.

N. A. COWDREY,
TREMAIN & TYLER,
MASON W. TYLER,
Of Counsel for Appellants.

Supreme Court of the United States.

PACIFIC RAILROAD (of Missouri),
Appellants,

vs.

GEORGE E. KETCHUM and others,
Appellees.

No. 242.

October Term, 1879.

Brief of appellants upon question of jurisdiction, involving the construction of the Act of March 3d, 1875, filed under order of the Court, October Term, 1878, made in cases Nos. 207, 210 and 500 of that Term, to wit: Delaware Railroad Construction Company *vs.* Meyer and others, trustees.

This bill was filed in Circuit Court of the United States for the Eastern District of Missouri, by a bondholder, George E. Ketchum, a citizen of the State of New York, appellee, to foreclose a mortgage made by the appellant, Pacific Railroad, bearing date July 10th, 1875. The first coupon on the bonds for six months' interest was made to mature November 1st, 1875. At the time of the execution of the said mortgage the road was under lease to the Atlantic & Pacific Railroad Company, which was bankrupt. The directors of the latter company, in 1872, bought a majority of the stock of the Pacific Railroad of Missouri, executed a lease to their own company, and elected directors in their interest, who, among other things of a questionable character, executed the above described mortgage.

The mortgage was made to Henry F. Vail and James D. Fish, citizens of the State of New York, trustees.

The trustees refused to foreclose in November, 1875, believing they had no right. Therefore the suit was brought by a bondholder in behalf of the other bondholders, and Vail and Fish were made defendants.

The following are the jurisdictional averments of the bill:

Humbly complaining shows unto your Honors your orator, *George E. Ketchum, a citizen of the State of New York*, who brings this bill of complaint against the Pacific Railroad, a cor-

poration created under and by virtue of the laws of the State of Missouri, and against the Atlantic & Pacific Railroad Company, a corporation created and organized under and by virtue of an Act of Congress of the United States, approved July 27, 1866, and at the several times hereinafter mentioned engaged in operating and maintaining a railroad in the State of Missouri aforesaid, and against James Baker, Rufus J. Lackland and Dwight Durkee, citizens of the State of Missouri, *and Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett and Luther C. Clark, citizens of the State of New York.*

The defendants appeared by solicitors, and a decree was entered by consent of solicitors of record, which, after finding "that the interest of the complainant and other bondholders may be seriously affected by delay in the institution of proceedings to foreclose the said mortgage, inasmuch as by the terms of said mortgage the said trustees are not authorized to sell the property secured by said mortgage until six months after demand made for the payment of said interest." Ordered, "that the Pacific Railroad do stand absolutely debarred and foreclosed of, and from all equity of redemption of, in and to the said mortgaged premises," and that the property be sold.

We shall confine ourselves strictly to the question of whether the Circuit Court of the United States could take jurisdiction of this suit, leaving the peculiar features of this case to be discussed when the cause is reached by the Court, in its order, upon the calendar.

First

By reason of the citizenship of the parties apparent on the record, the Circuit Court had no jurisdiction, under the Constitution and laws of Congress, to entertain this action or enter any decree whatever.

The Consitution limits the exercise of the judicial power in these words: "The judicial power of the United States shall extend to * * * controversies between citizens of different States."

As the judicial power given to the Circuit Court by acts of Congress cannot extend beyond the limits prescribed for it by the Constitution, we will first consider the constitutional provision and how far it has already been construed and its language interpreted by the Courts.

Mossman *v.* Higginson, 4 Dallas, 12.
Hodgson *v.* Bowerbank, 5 Cranch, 303.

History.

The confederation of States known as the United States had accomplished the war of Independence. Thirteen independent States had grown up under separate charters, animated by an intense jealousy of foreign domination of every description. Only the stern necessities of defense against a common foe, who threatened to overthrow them all in a common ruin, drove them into a union under the confederation, which abridged in the slightest degree the independence of their several State governments.

The Revolutionary war proved to the States that they had many things in common which called for union and demanded a united administration in behalf of all the States and all the people. It also proved that the confederation as then existing was an utter and entire failure. It was not self-supporting. It acted through the States in every essential particular. It had a legislative but no executive or judicial department. Its legislative department from necessity advised laws rather than made them. It sometimes attempted executive functions through its officers, but their success was entirely dependent upon the co-operation of the State governments.

After the war, the question which perplexed the public was how to get the advantages of union without impairing the integrity and the independence of the several States in their local affairs.

On February 21, 1787, a preamble and resolution was passed by the old Congress, which recited that whereas defects existed in the confederation, Resolved that it is expedient that a convention of delegates be held "for the sole and express purpose of revising the articles of confederation."

The convention met May 14, 1787. The journal of the convention contains the following references to the judiciary.

Charles C. Pinckney, on May 29, 1787, offered a draft of a Constitution. Article IX is as follows:

"The Legislature of the United States shall have the power and it shall be their duty to establish such courts of law, equity and admiralty as shall be necessary."

"The judges shall hold their office during good behavior, and receive a compensation which shall not be increased or diminished during their continuance in office. One of these courts shall be termed the Supreme Court, whose jurisdiction shall extend to all cases arising under the laws of the United States, or affecting ambassadors, other public ministers or consuls, to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction. In cases of impeachment, affecting ambassadors and other public ministers, this jurisdiction shall be original and in all other cases appellate."

"All criminal offenses (except in cases of impeachment) shall be tried in the State where they shall be committed. The trials shall be open and public, and be by jury."

Journal of the Convention, p. 78.

Edmund Randolph submitted several resolutions which, on June 19, were agreed to in the following shape as regards the judiciary:

"13. That the jurisdiction of the National Judiciary shall extend to cases which respect the collection of the national revenue, impeachment of any national officers, *and questions which involve the national peace and harmony.*"

Adopted p. 188.

On July 23 and 26 all the resolutions adopted by the convention and drafts of constitutions were referred to a "committee of detail," appointed for the purpose of reporting a constitution. This committee consisted of five members: John Rutledge (afterwards appointed Chief Justice of the U. S. Supreme Court in July, 1795), Oliver Ellsworth (Chief Justice of said Court from 1796 to 1802), James Wilson (an Associate Justice of that Court at the time of its formation), and two other members, Nathaniel Gorham and Edmund Randolph. On August 6th this committee reported a draft containing the following provision as to the judiciary:

ART. XI.

"SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as shall, when necessary, from time to time, be instituted by the Legislature."

"SEC. 2. The Judges of the Supreme Court and of the inferior courts will hold their offices during good behavior. They shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."

"SEC. 3. The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting ambassadors, other public ministers and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States (except such as shall regard territory or jurisdiction); between a State and citizens of another State, *between citizens of different States*, and between a State or the citizens thereof and foreign States, citizens or subjects."

"In cases of impeachment, cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, this jurisdiction shall be original. In all other cases

before mentioned it shall be appellate, with such exceptions and under such regulations as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned, except the trial of the President of the United States, in the manner and under the limitations which it shall think proper, to such inferior Courts as it shall constitute from time to time."

Journal, p. 226.

It will be seen that under a resolution giving the National Judiciary jurisdiction to decide cases arising under laws passed by the General Legislature and *such other questions* as involve the national peace and harmony, the substantial language of Article III. of our present Constitution was framed by this eminent committee of five. They originated the phrase, "controversies between citizens of different States."

It is a singular fact that the same Oliver Ellsworth who figured on this committee, afterwards, as United States Senator, drafted the Judiciary Act of 1789, and then with Rutledge and Wilson, other members of the same committee, and with John Blair and William Patterson, who were fellow-members of the Constitutional Convention and afterwards associate justices of the same Supreme Court until 1807, and with John Jay, one of the authors of the "Federalist," and the first Chief Justice of that Court, he assisted in giving that Act and that phrase of the Constitution the interpretation which it has since held in spite of the changes of phraseology employed in the acts of Congress.

We might naturally suppose that they knew what the Constitution meant when it said "controversies between citizens of different States." Certainly their interpretations ought not to be disregarded unless the Court has the very strongest reasons for differing from them in judgment.

The Act of 1789, drafted, as we have said, by Chief Justice Ellsworth, confers jurisdiction upon the Circuit Courts in these words:

Act of 1789, § 11. "The Circuit Courts shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature at common law or in equity where an alien is a party or the suit is between a citizen of the State where the suit is brought, and a citizen of another State."

§ 12. "If a suit be commenced in any State Court against any alien, or by a citizen of the State in which the suit is brought, against a citizen of another State, and the matter * * exceeds * * $500, and the defendant shall, at the time of his appearance in such State Court, file a petition for the removal," &c.

Now, jurisdiction and judicial power are synonymous terms. They mean *the right to decide; the power of judgment.*

Grignon *vs.* Astor, 2 How., 338.

"The judicial power is capable of acting only when the sub-

ject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case."

Osborne *vs.* U. S. Bank, 9 Wheat, 738.

A case, therefore, to which *the power* of judgment, under this provision of the Constitution, attaches in the United States Courts must be *a controversy between citizens of different States;* and a *suit* between citizens of different States, under the language of the Judiciary Act, must be a *controversy* between such citizens, or the *power of judgment* would not lie under the Constitution.

In Sewing Machine Co. cases, 18 Wall., 585, the Supreme Court say:

"A suit by a plaintiff against a defendant must mean substantially the same thing, in a practical sense, as 'a suit in which there is a controversy between the parties,' as each provision includes the word suit."

It is to be presumed that the framers of the Constitution acted advisedly, and meant something by it, when they discarded the more usual word, "*suit*," and adopted the word, "*controversy*," and since, as we have seen, a suit between citizens, &c., of which the Court has jurisdiction, must be a controversy between those citizens, we naturally conclude that, although the suit must be a controversy, a controversy between citizens of different States is not always a suit between such citizens, otherwise there would be no sense in dropping the word "cases," which is identical with suits, and using the word "controversies" in the Constitution; and if the framers of the Constitution had intended that the United States Courts should take jurisdiction of all suits in which there was a controversy between citizens of different States, we must presume they would have said so.

Under the resolutions of the Constitutional Convention the committee were to draft a provision giving the judiciary of the United States the right to decide *such questions* as involved the national peace and harmony, and the committee reported a provision authorizing it to decide controversies with certain national characteristics, such as those between citizens of different States. But the Court cannot decide controversies unless they are embodied in a suit, and that suit must be so brought that it presents *a pure and clean controversy between citizens of different States.* Otherwise the Court will not decide it. The reason for this will appear in the fourth and fifth points of this brief.

The language of the Judiciary Act is "a suit between a citizen of the State where the suit is brought and a citizen of another State."

The Court has always construed this language as equivalent to *suits between citizens of the State where the suit is brought and citizens of other States*, which is the same as *suits between*

citizens of different States, with the limitation that one of the parties, plaintiff or defendant, must be citizens of the State where the suit is brought.

But they say in every case the *suit* must be a clean controversy between such citizens.

In *Connolly* v. *Taylor*, 2 Peters, 556, bill was filed in District of Kentucky by aliens and by citizens of Pennsylvania against citizens of Kentucky and one citizen of Ohio.

The Court say: "Had the cause come on for hearing in this state of the parties a decree could not have been made in it for want of jurisdiction."

"The substantial parties are aliens and the Court had original jurisdiction between them and all the defendants, but they prevented the exercise of this jurisdiction by uniting with themselves a person between whom and one of the defendants the Court cannot take jurisdiction. Had the cause come on for hearing in this state of the parties a decree could not have been made for want of jurisdiction."

In *Vattier* v. *Hinde*, 7 Peters, 252, the same practice is sanctioned.

In *Wood* v. *Davis*, 18 How., 467, Davis, a citizen of Illinois, filed a bill in State Court of Illinois against Wood, Abbott & Co., citizens of Pennsylvania, and four other nominal parties, citizens of Illinois. Wood, Abbott & Co. appeared and under Judiciary Act removed the suit into the Circuit Court for Illinois. Jurisdiction was sustained on the ground that the four defendants from Illinois were no longer parties.

In *Strawbridge* v. *Curtiss*, 3 Cranch, 267, bill filed in Massachusetts by citizens of Massachusetts *v.* three citizens of that State and Curtiss, citizen of Vermont. Court refused to take jurisdiction.

In *Course* v. *Stead*, 4 Dall., 22, the original bill described the parties so as to give the Court jurisdiction. A supplemental bill was filed making a new party without stating his citizenship. Decree was entered in the Circuit Court with the pleadings in this condition.

This decree was reversed because the Court had no jurisdiction.

In *Coal Co.* v. *Blatchford*, 11 Wall., 172, Blatchford, a citizen of New York, and Newman, citizen of Pennsylvania, filed a bill in Pennsylvania against Coal Company, a corporation of Pennsylvania, for foreclosure of mortgage made by defendant to them as trustees for bondholder.

Decree was reversed for want of jurisdiction.

Gaylord v. *Kelshaw*, 1 Wall., 81. Gaylord, a citizen of Ohio, filed a bill in Indiana against Butterworth, a citizen of Indiana and Kelshaw, whose citizenship was not averred.

Suit was dismissed for want of jurisdiction.

In *Barney* v. *Baltimore City*, 6 Wall, 280, plaintiff, a citizen of

Delaware, sued defendant, a Maryland corporation and others, citizens of Maryland, also holding interests in the litigated property for citizens of the District of Columbia, in Circuit Court for Maryland.

The suit was dismissed for want of jurisdiction.

In *Horn* v. *Lockhart*, 17 *Wall.*, 570, where citizens of Texas sued citizens of Alabama, in Alabama Circuit, making citizens of Texas defendants, as to whom suit was dismissed, before decree, the Court sustained the jurisdiction.

In *Godfrey* v. *Terry*, 7 Otto, 178, Terry, a citizen of Virginia, filed a bill in South Carolina against a Receiver, Directors and Stockholders of a South Carolina corporation.

Held, Court had no jurisdiction.

In *Kendig* v. *Dean*, 7 Otto, 423, Kendig, a citizen of Tennessee, sued Dean, a citizen of Ohio, in Tennessee, for stock in a Tennessee corporation which was not made a party to the suit.

Held, that the Court had no jurisdiction, because there was an inevitable controversy in the suit between citizens of the same State.

The doctrine of all these cases is that the suit, as presented to the Court for the exercise of its judicial power, must present a clean and apparent controversy between citizens of different States, or the Court cannot decide it.

Under date Feb. 28, 1839, Congress passed the following Act., (5 Stat. at large 321):

" Where, in any suit at law, or in equity, commenced in any Court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the Court to entertain jurisdiction and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer, and the non-joinder of parties who are not so inhabitants, or found within the district shall constitute no matter of abatement or other objection to said suit."

In Louisville Railroad Co. v. *Letson*, 2 How., 556, it is said: " This law was passed exclusively with an intent to rid the Courts of the decision in the case of Strawbridge *vs.* Curtis."

This act has been held by implication to confer jurisdiction upon the Court over a controversy between citizens, neither of whom were of the State where the suit is brought, provided they voluntarily appear in such suit.

Jones v. *Andrews*, 10 Wall., 327: Jones, a citizen of Georgia, sued Andrews, a citizen of New York, and Reed and Bryson, citizens of Tennessee, in Tennessee, and Andrews moved to dismiss because the controversy, as between him and Jones, was

not between a citizen of the State where the suit was brought and a citizen of another State. Jurisdiction sustained.

Under this act, therefore, the Circuit Courts had jurisdiction of controversies between citizens of different States where there was voluntary appearance.

They also held that the Court might make a decree in suits not only where *proper* parties were out of the jurisdiction, as in *Union Bank* vs. *Stafford*, 12 How., 327, but even when the suit was upon a joint contract, and one of the joint contractors was out of the jurisdiction, or would oust the jurisdiction.

Clearwater *vs.* Meredith, 21 How., 491.
Insbuch *vs.* Farwell, 1st Black., 570.

But they have always held in every reported case that the Court cannot take jurisdiction of a suit under that act if an indispensable party was without the jurisdiction, or would defeat the jurisdiction.

Shields *vs.* Barrow, 17 How., 130.
Coiron *vs.* Millandon, 19 How., 113.
Barney *vs.* Baltimore City, 6 Wall, 280.
North. Indiana R. R. *vs.* Mich. Cen. R. R., 15 How., 233.
Kindig *vs.* Dean, 7 Otto, 423.

In *Ober* v. *Gallagher*, 3 Otto, 199, Ch. J. Waite says: "The Act of 1839 gave right to sue a citizen of another State served with process in the State where suit was brought."

"*If, however, an indispensable party (defendant) was a citizen of the same State with the plaintiff, the jurisdiction would be defeated, because the controversy would not be between citizens of different States, and thus not within the judicial power of the United States, as defined by the Constitution.*"

Act of 1866, July 27, 14 Stat., 306, is as follows: "If, in any suit already commenced, or that may hereafter be commenced in any State Court * * by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the sum of $500, exclusive of costs, to be made to appear to the satisfaction of the Court, a citizen of the State in which the suit is brought is, or shall be, a defendant, and if the suit, so far as relates to the alien defendant, or to the defendant who is a citizen of a State other than that in which the suit is brought, is, or has been instituted or prosecuted for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then, in every such case, the alien defendant, or the defendant who is a citizen of a State other than that in which the suit was brought, may file petition," &c., for the removal of the cause as against him.

This Act substantially uses the language of the Judiciary Act, *i. e.*, "a suit by a citizen of the State in which the suit is brought against a citizen of another State;" but it expressly sanctions the separation of *the controversy between citizens of different States* from the suit and its transfer to the United States Court, provided it can be decided, so far as it concerns him (the non-resident defendant), without the presence of the other party.

Under this Act the Court decided, *Gardner* v. *Brown*, 21 Wall, 36, a suit commenced by Brown, a citizen of Tennessee, in State Court of Tennessee, against Gardner, a citizen of New York, and Walker, a citizen of Tennessee, for the foreclosure of a deed of trust, made by Gardner to Walker to secure notes of Gardner to Vassar. Brown was administrator of Vassar's estate. Gardner petitioned for removal under Act of 1866.

Jurisdiction refused, on the ground that Walker was an indispensable party, or, in the language of the Act, the suit could not be determined, so far as it concerned Gardner, without the presence of Walker.

The Act of March 2d, 1867, was passed as an amendment to Act of July 7th, 1866, and is as follows: "Where a suit is now pending or may hereafter be brought in any State Court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of $500, exclusive of costs, such citizen of another State, whether plaintiff or defendant, if he will make and file in such State Court an affidavit, stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State Court, may * * * file a petition," &c., for removal of that suit.

In this Act Congress first uses the term "suit in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State," which in the Sewing Machine Companies' cases, the Court say, means substantially the same as a suit between those parties.

In *Gaines* v. *Fuentes*, 2 Otto, 10, the Court say:

"The Act (of 1867) *covers every possible case* involving controversies between citizens of the State where the suit is brought and citizens of other States, if the matter in dispute, exclusive of costs, exeeds the sum of $500."

In Sewing Machine Companies cases, 18 Wall, 553, a citizen of Massachusetts filed a bill, in State Court of Massachusetts, against a citizen of Connecticut, a citizen of New York and a citizen of Massachusetts, upon a joint liability; the citizens of Connecticut and New York petitioned for removal under the Act of 1867.

Certainly this was *a suit* within the express terms of the statute, in which there was a controversy between a citizen of

the State in which the suit was brought and a citizen of another State, and the citizen of another State filed the affidavit, and if the Court had the constitutional power of taking jurisdiction in such a case, the language of the act was sufficient to confer jurisdiction over this suit, and yet the Supreme Court denied the jurisdiction of the United States Court.

The suit was not a clean controversy between citizens of different States, and the Act attempted to give the Court jurisdiction of the suit.

In *Vannevar* v. *Bryant*, 21 Wall. 41, plaintiff and four of the defendants were citizens of Massachusetts, where suit was brought; three defendants were citizens of Maine, and one, of Missouri.

Suit was for damages for a personal injury to plaintiff, inflicted by a servant of defendants on a steamboat which they owned. The three citizens of Maine attempted to remove the suit into the United States Court, and the Supreme Court say it is governed by the Sewing Machine Company cases, and denied jurisdiction. The following decisions also illustrate this Act:

Knapp *vs.* R. R. Co., 20 Wall, 117.
Gaines *vs.* Fuentis, 2 Otto, 10.
Hurst *vs.* Atlantic R. R. Co., 3 Otto, 71.
Amory *vs.* Amory, 5 Otto, 186.

Under all these acts the Supreme Court has, without an exception, interpreted the word "between" as meaning "exclusively between." When Congress said, in the Judiciary Act, that the Circuit Court shall have cognizance of *all* suits where the suit is between a citizen of the State where the suit is brought and a citizen of another State, they necessarily called for a definition of that word "between." It is the only qualitative word in the sentence. The Court thereupon declared that a suit between a citizen of the State where the suit is brought and a citizen of another State is only a suit where the plaintiffs or defendants are all citizens of the State where the suit is brought, and the other parties to the suit are all citizens of other States. They did not limit the suit to a single citizen on each side, nor did they confine the controversy to a *citizen* or *citizens* of the State where suit is brought and a citizen or citizens of *one other* State; but they have always maintained, in language that cannot be misunderstood, that a suit in which there was a plaintiff and a defendant citizens of a common State could not be a suit between a citizen of the State where the suit is brought and a citizen of another State. To be "between" it must be *wholly between—exclusively between.* They have stretched the language of this paragraph of the Judiciary Act in every other respect. They read *a citizen* as *citizens,* and *another* as *others,* but they have always read *between as strictly between.*

Under the act of February 28, 1839, they stretched the jurisdiction of the Court by implication over suits where some of the defendants were citizens of the State where the suit was brought, and some of them citizens of other States, and the plaintiffs citizens of still different States, but under this act, and those of 1866 and 1867, they have ever maintained the integrity of that word, *between*. Of course this word must have the same meaning in the Constitution that it does in these acts of Congress. And the reason beyond a doubt of their unwavering adherence to this strict construction of this word, *between*, is that the same word is the real qualitative word in the section of the Constitution we are considering.

The act of March 3, 1875 (18 Stat. at L., 470), provides as follows: "The Circuit Courts of the United States shall have original cognizance * * * of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of $500 * * * in which there shall be a controversy between citizens of different States."

"SECT. 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State Court, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500 * * * in which there shall be a controversy between citizens of different States * * * either party may remove said suit into the Circuit Court of the United States for the proper district; and when in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit into the Circuit Court of the United States for the proper district."

It is difficult to see how the Court could take jurisdiction, either original or by removal, under the Act of 1875, of a suit in which there was a controversy between a citizen of the State in which the suit was brought and a citizen of another State (which is a controversy between citizens of different States), with an indispensable plaintiff and defendant from the same State in the suit, and refuse such jurisdiction by removal under the Act of 1867.

The language of the two acts, so far as they describe the cases included within their provisions respectively, is nearly identical in its force and meaning, with the limitation that, under the Act of 1867, one of the parties to the controversy must be a citizen of the State in which the suit is brought. (See Gaines *vs.* Fuentis, *supra*).

Both acts speak of a suit in which there is a controversy between citizens of different States. (A controversy between a citizen of the State in which the suit is brought and a citizen of another State, is a controversy between citizens of different

States). Both acts, in terms, confer jurisdiction over the suit, and not alone the controversy.

The principle which decided that the Court could not take jurisdiction in the sewing-machine companies' cases, under the Act of 1867, *must decide that the Court cannot take jurisdiction, under the Act of* 1875, *of a suit where indispensable parties, plaintiff and defendant, are from the same State—in other words, where the suit does not present a clean controversy between citizens of different States.*

This is in accordance with Justice Story's interpretation of the Constitution, as construed by the Court. He says:

> "There is a peculiar class of American cases which may "give rise to an objection to the jurisdiction, founded solely "upon the limited powers of the Court of Equity over the "parties, and altogether independent of the subject-matter "of the bill. Under the Constitution and laws of the "United States, the circuit courts have, with few excep- "tions, jurisdiction only in suits between citizens of differ- "ent States. And this has been construed to require that "all the parties on each side of the record should be citi- "zens of different States, and should be expressly averred "to be so in the bill. If there be no such averment, the "objection will be fatal to the suit in every stage of the "proceedings, and it may be taken advantage of by de- "murrer, as the Court will not take jurisdiction over the "parties or the cause, unless it is apparent upon the face "of the proceedings."
>
> Story, Eq. Pl., § 492.

Second.

THE PRESUMPTION IS THAT THE LANGUAGE IN WHICH THE LAW-MAKER RECASTS THE LAWS ON A GIVEN SUBJECT IS USED IN THE SENSE ALREADY FIXED BY JUDICIAL CONSTRUCTION, OR WITH SPECIAL REFERENCE TO THAT CONSTRUCTION.

Sewing Machine Companies' Cases, *supra.*

When, therefore, Congress used, in the Act of 1875, the very expression used in the Act of 1867, it must be presumed to have the meaning already given to that expression, and that the Legislature adopted the meaning with the expression.

It is the business of the Legislature to change the laws; of the Court, to fix them—determine them.

Third.

The consistent stand taken by the Supreme Court during its ninety years of existence upon the principle that it will only decide clean controversies between citizens of different States disentangled from other controversies, is in entire harmony with the strict rules it early established, and has rigidly adhered to to enforce this principle, and also with its rulings upon all kindred questions.

(1) "There are absolutely no presumptions in favor of the jurisdiction of the Courts of the United States."
Ex parte Smith, 4 Otto, 455.
Robertson *vs.* Case, 7 Otto, 646.

(2) The citizenship of the parties must be averred upon the record so that the facts necessary to give the Court jurisdiction may affirmatively appear at the outset, or in default thereof the Court will not exercise jurisdiction.
Bingham *vs.* Cabot, 3 Dallas, 382.
Turner *vs.* Emille, 4 Dallas, 7.
Gold Washing & Water Co. *vs.* Keyes, 6 Otto, 199.
Godfrey *vs.* Terry, 7 Otto, 171.

(*a*) The averment must be of citizenship. It is not enough to use an equivalent phrase.
Abercrombie *vs.* Dupuys, 1 Cranch, 346.
Robertson *vs.* Case, 7 Otto, 646.

(*b*) The rule is strictly enforced as to time.
Insurance Co. *vs.* Pechnor, 5 Otto, 186.

(*c*) It must also be an individual citizenship.
Amory *vs.* Amory, 5 Otto, 186.

(3) In actual practice the rules for applying these tests of the jurisdiction are well settled. If the record is silent as to the jurisdictional character of citizenship the judicial proceedings are subject to be evaded on error or appeal.
Bingham *vs.* Cabot, 3 Dallas, 382.
Gold Washing & Water Co. *vs.* Keyes, 6 Otto, 199.

If the citizenship is so laid that the jurisdiction would *prima facie* attach, but in point of fact is falsely averred, the apparent jurisdiction may be ousted by pleading the truth in abatement.
Livingstone *vs.* Story, 11 Peters, 353.

In all cases where the citizenship is so averred as to exhibit on the very face of the record a controversy wholly or partly between citizens of the same State the judicial power does not, and cannot, under the Constitution, extend to such a controversy. The Circuit Court has consequently no jurisdiction, and its decrees and acts thereunder are absolutely void.

Hickey *vs.* Stewart, 3 Howard, 750.
Coal Co. *vs.* Blatchford, 11 Wallace, 172.
Mail Co. *vs.* Flanders, 12 Wallace, 130.

This rule is so rigid that the result is not altered, though the subject matter of the controversy relates exclusively to Federal questions, if Congress has left the jurisdiction to depend on differing citizenship, and not upon the subject matter. Controversies between citizens of the same State touching abandoned property acts are not cognizable.

Jackson *vs.* Ashton, 8 Peters, 148.
Nail Co. *vs.* Flanders, 12 Wallace, 130.

Nor under the customs act.

Insurance Co. *vs.* Ritchie, 4 Wallace, 542.
Hornthall *vs.* Collector, 9 Wallace, 564.

This fact of different citizenship is the jurisdictional fact without which the Court cannot take jurisdiction of the suit, and which cannot be legally waived by the Court, and the rules therefore applicable to it in connection with jurisdiction, are the same rules that apply to any other subject matter in contra-distinction from the rules usually applied by the courts upon the question of their jurisdiction over persons. Positive consent cannot, therefore, either originally authorize the exercise of jurisdiction in such case, or rescue from annulment the decrees entered in violation of the constitutional prohibition.

Brigham *vs.* Luddington, 12 Blatchford, 241.
The Nonesuch, 9 Wallace, 504.
Washington County *vs.* Durant, 7 Wallace, 694.
The Alicia, 7 Wallace, 571.
Scott *vs.* Sanford, 19 Howard, 393.
The Lucy, 8 Wallace, 307.

The only qualification that exists to these rules is where a merely nominal party, having similar citizenship to the complainants, or some of them, is made a co-defendant, the jurisdiction may be saved by striking out, at any time before hearing, the name of such nominal party, and proceeding to decree against the real parties in interest who are liable to suit.

Connoly *vs.* Taylor, 2 Peters, 564.
Vattier *vs.* Hinde, 7 Peters, 261.
Horn *vs.* Lockhart, 17 Wall, 570.

(3) The adherence of the Court to this principle is also in entire harmony with its long series of decisions under the twenty-fifth section of the Judiciary Act, where the Supreme Court has steadfastly refused to take jurisdiction by appeal of any case or question that did not strictly conform with the affirmative terms of that section, and is also in harmony with the recent construction given by this Court to the Act of 1867, which omitted the restrictive clause contained in the 25th section of the Judiciary Act, and yet the Court refused under this act to decide anything but the federal question contained in such cases. In interpreting this latter Act, in *Murdock* v. *The City of Memphis*, 20 Wallace, 590, the Court say: "Congress having defined and regulated jurisdiction in certain classes of cases, the affirmative expression of the will of that body is to be taken as excepting all other cases to which the judicial power of the United States extends than those enumerated." Certainly it would seem that the same rule of interpretation was applicable to the Constitution.

Applying these principles to test the jurisdiction of the Circuit Court in this cause, we find a bill in Chancery filed by Ketchum, describing himself as a citizen of New York, making defendants six persons alleged to be citizens of New York and several others alleged to be citizens of Missouri. Obviously such pleading presents a controversy over which the Circuit Court could not constitutionally exercise any jurisdiction whatever, unless the six defendants, having the same citizenship as the complainant, were merely nominal parties, in which event the bill might be dismissed as to them and retained for decree against the remaining defendants. "The question always is, and should be, when objection is taken to the jurisdiction of the Court by reason of the citizenship of some of the parties, whether to a decree authorized by the case presented they are indispensable parties."

Horn v. *Lockhart*, 17 Wallace, 579.

The relation of these six citizens of New York to the subject matter of controversy and the relief prayed, will demonstrate whether, under the rulings of this Court, they were nominal or indispensable parties, to authorize any decree whatever. Vail and Fish were the trustees in the very mortgage sought to be foreclosed. Not only the amount due, but the validity of that mortgage and the right to foreclose under it, were to be litigated. The legal estate was vested in them. "They are the parties to the mortgage contract, negotiating its terms and stipulations, and to them the usual rights and powers of mortgagors are reserved, and to them the usual obligations of mortgagors are made."

Coal Co. *v.* Blatchford, 11 Wallace, 170.

Still more recently it has been decided that the trustees in such an instrument are not nominal, but are the real parties in interest to enforce a claim accruing to them in the execution of their trust, and are charged with the responsibility of conducting the litigation.

Knapp *vs.* Railroad Co., 20 Wallace, 123.
Gardner *vs.* Brown, 21 Wallace, 36.

This proceeding did not simply embrace a formal foreclosure of bonds outstanding at the time when the bill was filed; it had a broader scope. The bill alleged, and the decree found, that divers unissued third mortgage bonds were even then in the hands of Vail and Fish, who were ordered to exchange them at any time before sale for income and improvement bonds, and these very bonds, thus emitted after decree and before sale, were declared to be a legal tender on the bid. In this respect the case was like that of *Knapp* v. *Railroad Co.*, *supra*, in some of its features, where the Supreme Court say that the trustees could not be relieved by any act of the State Legislature of their relations to the controversy. The Court thus assumed the general guardianship of an executory trust, acting directly *in personam* upon citizens of New York at the suit of another citizen of the same State.

The only standing which Ketchum had in a court of equity to foreclose the mortgage was to enforce the trust on the alleged malfeasance of the trustees. "So long as the trustees do not refuse to discharge the trust reposed in them, other parties are not authorized to institute or prosecute any proceedings for the enforcement of the mortgage, or to exercise any control over them."

Coal Co. *vs.* Blatchford, 11 Wallace, 170.

"The bondholders can ask the aid of a court of equity only on the ground of unfaithfulness, neglect or inability on the part of the trustees. The only standing the original complainants had in court arose from the allegation in their bill that the trustees, in their mortgage, were derelict."

Per Waite, *C. J.*, in Richards *vs.* Chesapeake & Ohio Railroad Co., 1 Hughes, 28.

In such a suit the trustees represent the other bondholders. One bondholder cannot bring suit, even though professing to act in behalf of all who may come in and contribute to foreclose a mortgage given to secure several bondholders whose several interests are described, unless the other bondholders join with him.

Railroad Co. *vs.* Orr, 18 Wallace, 471.

The *cestui que trust*, that is the bondholders, could not maintain this action, except in case the trustees refuse to perform their duty, and then the trustees must be made parties defendant.

Western Railroad Co. *vs.* Nolan, 48 N. Y., 513.
Ribon *vs.* Railroad Co., 16 Wallace, 450.

Ketchum's bill, in this case, made the allegation of unfaithfulness. Whatever was necessary to be alleged must necessarily be proven at the hearing to justify relief. In this view the suit was primarily and directly against the trustees, charging a breach of trust, and that must be alleged and proven as a condition precedent to any remaining relief.

Walker *vs.* Sigmonds, 3 Swanston, 75.
Perry *vs.* Knapp, 4 Beav., 179.
Dodge *vs.* Wolsey, 18 Howard, 331.
Memphis *vs.* Dean, 8 Wallace, 73.

There was, therefore, at the very threshold of the suit for the foreclosure of this mortgage, a controversy between citizens of the State of New York, which must be decided in favor of the complainant before the Court could recognize any further right of action in the complainant. Summoned to answer in the charge of infidelity to their trust, the trustees could, of course, plead to the jurisdiction, tender an issue defending their primary right of control of the trust vested in them, advance evidence and appeal from a decree convicting them of a breach of trust or displacing them. This would obviously constitute a material and definite controversy, incapable of being tried in a Federal Court, between bondholders and trustees of a similar citizenship. This was the precise issue tendered by the bill in this cause. The trustees filed no cross-bill; this decree of foreclosure was based on the original bill of the bondholder; this could only be justified on the theory that the charge of dereliction had been proven or admitted. Over that controversy, the settlement of which was an indispensable prerequisite to any relief, the Circuit Court had no jurisdiction whatever because it was exclusively between citizens of the same State. The fact that another controversy might exist in the cause between the parties of differing citizenship would not save the jurisdiction. The suit would not present a clean controversy between citizens of different States.

Sewing Machine Co's. cases, 18 Wallace, 575.
Vanderveer *vs.* Bryant, 21 Wallace, 41.
Kendig *vs.* Dean, 7 Otto, 423.

The other citizens of New York, defendants, were trustees under prior mortgages. The scope of the bill was to sell, subject to such earlier incumbrances. This necessitated an issue as

to their extent, validity, date and amount. The decree adjudged upon such matters and ordered the sale, subject to these ascertained incumbrances. They were never dismissed from the record, and are indispensable parties to the validity or efficiency of the decree as annulled, and the same objections exist against this exercise of jurisdiction in the case of the other citizens of New York, defendants, which apply to Vail and Fish.

Fourth.

The United States Courts, in the class of cases under consideration, are foreign tribunals. They form no part of the State judiciary; yet nine-tenths of the cases they are called upon to consider are cases which involve only State questions. The subject matter is purely of State judicial cognizance.

"The duties of the Court to exercise jurisdiction when it is conferred and not to usurp it when it is not conferred, are of equal obligation."

Chief Justice Marshall, in *Bank* v. *Devaux*, 5 Cranch, 87:

"It is our duty not to transcend the limits of the jurisdiction conferred upon the Court."

Fulton *v.* McAfee, 16 Peters, 152.

In other words, the Supreme Court has always taken the ground that the right to decide a suit must be clear and indisputable, or they would not allow jurisdiction.

The wisdom and prudence which gave original shape to our governmental institutions, avoided every possible temptation to collision between sovereign states and a sovereign nation. Our fathers recognized the fact that different governments should have distinct spheres of action. Confederacies of States, in the world's history, have always been short-lived, through neglect of this principle. The State government and the State judiciary must of necessity be charged with the control and administration of State and local affairs. A foreign tribunal, representing a distinct sovereign, should not meddle with such administration or control, if there is a shadow of a doubt about the right to do so.

In the first place, it introduces confusion, and inevitably lead to contrariety of decision. Uniformity and certainty are the prime essentials of law.

In the second place, it is a source of irritation, and leads to collisions between the respective governments, and although today the national government is strong and the States comparatively weak, the time has been when their positions in this re-

spect were reversed—it may come again. At any rate we should avoid all ways that lead to conflict. For whether the nation or the state is victorious in such a struggle, the body politic is wounded.

It must be remembered that the administration of justice, accorded under the Constitution to the United States Courts, between citizens of different States, does not involve the administration of any national laws. The United States Courts are called upon to administer the laws of the States where the courts are situated or the transaction occurred. When one sovereign administers the laws of another sovereign, it has always been as a matter of courtesy or comity. It does it only in the interest of justice, usually because the parties are without any other tribunal. But the United States Courts have not this excuse. The State Courts are the proper tribunals for local litigation; and for the United States Courts to step into every suit in which a citizen of another State has an interest, and drag all the parties away from the tribunal which naturally administers the laws under which the transaction occurred and the suit arose, would be both an unreasonable and a very dangerous practice.

The State Courts bring justice to every man's door. The United States Courts are located at only one or two points in each State, and the hardship of carrying on a distant litigation would in many instances amount to a denial of justice.

Fifth.

As in ordinary cases, there is a presumption against the jurisdiction of the United States Courts, there ought to be a double presumption against their jurisdiction in this class of cases.

In State affairs, in cases arising under the local laws, the United States Courts are foreign tribunals. The State Courts are the natural tribunals. The United States Courts are amenable to one sovereign, and yet are administering the laws of an entirely different sovereign.

They are appointed by one sovereign to administer the laws of another in that other's territory. In this respect, in this class of cases (controversies between citizens of different States), the United States Courts are like Consular Courts.

The presumption is always against the jurisdiction of such courts, and they can only decide cases that come within the strictest letter of the powers conferred upon them by treaty. So the United States Courts, in this class of cases, should be confined in their jurisdiction to the strict letter of the Constitution.

Sixth.

The United States Courts cannot, either upon principle or upon precedent, take jurisdiction of a suit like the suit at bar, where indispensable parties, plaintiff and defendant, are citizens of the same State.

TREMAIN & TYLER,
167 Broadway, N. Y.

MASON W. TYLER,
N. A. COWDREY,
Of Counsel for Appellants.

Supreme Court

OF THE UNITED STATES.

THE DELAWARE R. R. CONSTRUCTION CO. & THE DELAWARE CO. R. R. CO., *Appellants,* *vs.* LEWIS H. MEYER, *et al.*, *Trustees.*	No. 209.
THE DELAWARE R. R. CONSTRUCTION CO., *Appellant,* *vs.* SAME.	No. 210.
LEWIS H. MEYER, *et al.*, *Trustees*, *Plaintiffs in Error,* *vs.* THE DELAWARE R. R. CONSTRUCTION CO.	No. 500.

The following brief is submitted on behalf of the plaintiffs in error in the following cases now pending in this court:

WILLIAM P. CHAPMAN, *et al.*, *Plaintiffs in Error,* *vs.* MORTON BROWNSON, *et al.*, Executors of NEWELL TAFT, deceased.	No. 236.

SAME, *Plaintiffs in Error*,

vs.

PETER G. PETTERSON.

No. 237.

No. 236 (Taft case) was commenced in the Supreme Court of the State of New York, and was first tried April 28th and 29th, 1869. Upon this trial the plaintiff below (Taft) was non-suited. The judgment upon this non-suit was reversed by the Court of Appeals, and a new trial ordered. The cause was again tried January 28th, 1873, and again resulted in a non-suit, which the General Term reversed, ordering a new trial. The cause was again tried in May, 1874, and a verdict ordered for the defendants below (plaintiffs in error). The Court of Appeals afterwards, in December, 1875, reversed the judgment upon this verdict, and again ordered a new trial, (pp. 1, 6, 7 and 8).

Before March, 1875, William P. and Henry P. Chapman, two of the plaintiffs in error, became citizens and residents of the state of Connecticut, their co-plaintiff in error, as well as the defendants in error, remaining citizens and residents of the state of New York.

This was the *status* of the parties in and after March, 1875.

The action was brought by Taft to recover $7,000 damages for the alleged conversion of certain government bonds which had come into the possession of the plaintiffs in error (pp. 1 and 7).

No. 237 (Petterson case) was a similar case, brought to recover $1,565 for the alleged conversion of certain government bonds (pp. 1 and 7), and at the commencement of that suit, in February, 1874, the plaintiffs in error, William P. and Henry P. Chapman, were, and ever since have been, citizens and residents of the state of Connecticut, and all the other parties were, during said time, citizens and residents of the state of New York (pp. 1, 8 and 9). This case has never been tried.

In May, 1874, a stipulation was made between the parties, that said cause should not be tried until after the determination of the Taft case (No. 236), which has never been determined (p. 9).

About January 5th, 1876, all of the plaintiffs in error (being all of the defendants below) filed their petitions and bonds in both suits for the removal of said suits into the United States Circuit Court, and thereafter filed the records and perfected their appearances in that court.

Neither case could have been tried at any time between March 3, 1875, and the filing of the said petitions and bonds for removal.

Defendants in error moved (under § 5 of the act of 1875) to remand the causes to the state court, on the ground that they were not removable under that act (p. 10), and this motion was granted by the court. (13 *Blatch.*, 395). The writs are brought to review these orders of the Circuit Court.

Errors:

1st. In that the Circuit Court held that these cases were not rightfully removed into that court, and should be remanded to the Supreme Court of the State of New York.

2d. In that the said Circuit Court ordered that these cases be so remanded.

BRIEF.

I.—The Constitution (Art. 3, § 2,) extends the judicial power of the Federal Courts to "controversies" "between citizens of different states." This is the broadest language that could be used, and when the jurisdiction so conferred is confirmed by statutory enactments, these courts have the fullest and most complete power, subject to such regulations as may be imposed by Congress, to draw to themselves every controversy between citizens of different states, no matter how it arises, or what other parties may be involved.

Congress at first exercised the power so conferred by the Constitution to a very limited extent.

By the judiciary act of Sept. 24, 1789, § 11, the Circuit Courts were given original concurrent jurisdiction with the state courts of every suit between a citizen of the state where brought and a citizen of another state, and by § 12, the only suits which could be removed under this clause were those brought against aliens, or by citizens of the states in which they were brought, against citizens of other states, and the petition was required to be filed at the time of entering the defendant's appearance.

This was the only enactment until the act of March 3, 1863. This act (§ 5) provides for the removal of suits against civil or military officers, or other persons, for trespasses, &c., during the rebellion under color of authority of the President or Congress, and requires the defendant to file his petition at the time of entering his appearance, or, if his appearance had been entered before the passage of the act, then at the next session of the court.

The act of May 11, 1866 (§ 3), provides that the right of removal under the act of 1863 may be exercised after the appearance and the filing of the plea, or at any term subsequent to the term when the appearance is entered, and before the jury is empaneled.

By the act of July 13, 1866 (§ 67), it is provided, that where suit is commenced against any officer of the United States acting under the internal revenue laws, &c., the defendant can present his petition for removal at any time before trial.

The act of July 27, 1866 (§ 1), provides, that if, in any suit already commenced, or thereafter commenced, against an alien, or by a citizen of the state in which the suit is brought, against a citizen of another state, and the suit, so far as relates to the alien, or citizen of the other state, is for the purpose of restarining or enjoining him; or if it is

one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants, then the first mentioned defendant may, at any time before the trial or final hearing, file the petition for removal. It further allows the plaintiff to proceed against the other defendants.

The act of March 2, 1867 (§ 1), amends the act of July 27, 1866, by making it provide that where a suit was then pending, or might thereafter be brought, in which there was a controversy between a citizen of the state where the suit was brought, and a citizen of another state, the latter, whether plaintiff or defendant, if he would make affidavit as to prejudice or local influence, &c., might, at any time before the final hearing or trial, file a petition for the removal.

The act of July 27, 1868 (§ 2), allows a corporation, under certain circumstances, to file the petition either before or after issue joined.

These are the principal acts which preceded that of March 3, 1875, and it will be seen that, while, from 1789 to 1863, Congress was silent upon the subject, the tendency has since been to enlarge the jurisdiction of the Federal Courts, until, by the act of 1875, the jurisdiction conferred by Congress has become commensurate with that provided by the Constitution.

II.—The language of the act of 1875 is unmistakable in this respect. It confers (§ 1) upon the Circuit Courts of the United States "original jurisdiction, "concurrent with the courts of the several states, of "all suits" *** "in which there shall be *a controversy* "*between* citizens of different states," and then proceeds to enforce this jurisdiction by allowing the removal of *all* cases then pending, or thereafter to be brought, in the state courts of the character mentioned in the first section. A comparison of

the language shows that Congress has intended to completely and fully exercise the power conferred by the Constitution, by the use of terms as broad and comprehensive as those used in the Constitution itself. It was, therefore, the undoubted intention of Congress, by the second section, to cover every case which could possibly arise.

III.—The first question, and that most dwelt upon by the learned and lamented judge who decided these cases was whether they came within the first or second classes of cases mentioned in the second section.

IV.—A review of some of the decisions of this court will be useful.

Strawbridge v. Curtiss, 3 *Cranch.*, 267.

This case merely held that under the language of the Judiciary Act, each distinct interest should be represented by persons all of whom are entitled to sue or be sued in the Federal courts, but applying this rule only where the interests are joint, and declining to give an opinion where several parties represent several distinct interests.

It will be observed that this case, and such other cases as have followed it, are based upon the language of the Judiciary Act. By that act the *suit* must be *by a citizen, &c., against a citizen, &c.* It does not say a *controversy* between citizens of different states, *in a suit, &c.*, like the act of 1875.

But this decision has met with the very emphatic disapproval of this court in the case of *Louisville R. R. Co. v. Letson*, 2 *How.*, 554, *&c.*

Coal Company v. *Blatchford*, 11 *Wall*, 172.

This suit was brought in the U. S. Circuit Court in Pennsylvania, by Blatchford, a citizen of New

York, and Newman, a citizen of Pennsylvania, against a Pennsylvania corporation, and was brought under the Judiciary Act. The plaintiffs claimed, also, to sue as trustees of an alien. Of course the case depended solely on the question as to whether the alien was "a party" within the meaning of the Judiciary Act; if not, there was no jurisdiction, because the suit was not against a citizen of another state than Pennsylvania. Any other question which the court may have considered was *obiter*.

Railway Co. v. Whitton's Administrator, 13 *Wall*, 270

This case affirms the constitutionality of the act of March 2d, 1867. This act was passed *pending* the suit in the State Court, and the plaintiff thereafter petitioned for the removal, which petition was granted by the State Court, but the order was afterwards reversed on appeal. This court affirmed the jurisdiction of the U. S. Circuit Court.

Here the cases of *The Moses Taylor*, 4 *Wall*, 429, is cited with approval, as holding that Congress has entire control over this matter, and can say in what cases, and at what period in those cases, and in what manner, the aid of the Federal Courts can be invoked, and the concurrent jurisdiction of the State Courts shall cease.

Case of the Sewing Machine Cos., 18 *Wall*, 553.

This suit was brought in the Massachusetts State Court, by a corporation of that state, against three corporations, one of Massachusetts, one of Connecticut, and one of New York, and answers were filed by all the defendants. Before the trial, the Connecticut and New York corporations filed petitions for removal, under the act of March 2d, 1867, but the State Court declined to entertain the petitions, and rendered judgment for the plaintiff. The case was brought here by writ of error.

This case passed upon the ground that Congress had not put into operation all the power conferred by the Constitution. The language of the act of 1867, taken in connection with Judiciary Act, and the act of 1866, did not, in the opinion of the court, warrant any different construction than that placed upon the Judiciary Act. But, as will be hereafter shown, Congress has, by the act of 1875, expressly exercised the full scope of its power. Its language is identical with that of the Constitution, and, the court, in the Sewing Machine Companies' case, (p. 586) reserved the Constitutional question.

This court, in *Vannevar* v. *Byrant*, 21 *Wall*, 41, approved of the Sewing Machine Companies' case, but declined to consider the question whether a non-resident defendant in an action of tort by a resident plaintiff, could remove the cause, as against himself, under the act of 1866.

It is plainly to be seen that none of the above cases, which were decided under previous acts, will furnish any rule for the construction of the act of 1875.

V.—That Congress intended, by the act, to cover such a case as the present, is, we think, plain.

By section 2, the two following cases are removable: 1st. A suit in which there is a controversy between citizens of different states; and, 2d. A suit in which there is a controversy *wholly* between citizens of different states, and which can be fully determined as between them. In the first case, the removal can be made only upon the application of one party or the other—that is, all of the plaintiffs, or all of the defendants. In the second case, it can be made on the application of one or more of the plaintiffs, or one or more of the defendants.

VI.—We have in this act a plain intent on the part of Congress to authorize the removal of just such a case as the present one. The case of the Sewing Machine Companies was decided in view of the Judiciary Act, and the subsequent legislation, and a definition of the word "controversy" was attempted there, not on general principles, but merely for the purpose of ascertaining the meaning of Congress in that particular act. The learned judge delivering the opinion merely assumed that Congress meant to treat the two words "suit" and "controversy" as synonymous in that particular act. The court is now called upon to construe these words in a very different relation. The second section shows that Congress did not use the words in the sense above stated. It intended to recognize the fact that a controversy could exist between some of the parties to a suit, and not all. For instance, a suit might have been pending against several defendants, some of whom had confessed judgment; then there would have been a suit between all, but a controversy between only a part. They intended to disregard entirely the number and *status* of the parties in interest, requiring only that one or more citizens of one state should be involved in a controversy with one or more citizens of another state, no matter what other parties were involved, nor on which side they were. Among others they intended to provide for such a case as a bill of interpleader, where, for instance, a citizen of New Jersey should file such a bill in New Jersey against a citizen of New Jersey and a citizen of New York, both defendants claiming the fund, and plaintiff should deposit the money in court, and thereby be discharged from liability, leaving the defendants to litigate between themselves:—that would be a suit, but not a controversy, between the plaintiff and defendants. The controversy would be between the two defendants. Such a case would be a very proper one to invoke the jurisdiction of

the Federal court; and it would be clearly within the provisions of the act of 1875.

See opinion of court by Mr. Justice Strong in *Taylor* v. *Rockfeller*, 35 *Leg. Int.*, 284.

VII.—Mr. Justice Bradley, in *Gerardey* v. *Moore*, 5 *Cent. L. J.*, 78, has very ably reviewed the act of 1875 in these respects.

He holds that Congress has attempted, by this act, to confer the full jurisdiction authorized by the Constitution, that the right of removal "exists in "all cases where there are substantial parties, citi- "zens of different states, on opposite sides of the "cause, although there are parties on opposite sides "who are citizens of the same state." And he considers that, under the act of 1875, the *whole cause* is removed, and not merely the portion which affects the citizens of different states.

That it is the whole suit that is removed is unquestionable. The language of §§ 2 and 3 is in each case "may remove said suit."

The view taken by Mr. Justice Bradley is also confirmed by the fifth section, which provides for the case of parties being improperly or collusively made or *joined* for the purpose of creating a case cognizable or removable to the Circuit Court. If the Sewing Machine Companies' case is to be the law of this one, then Congress has provided for a case which cannot occur.

In *Osgood* v. *Chicago, D. & V. R. R. Co.*, 14 *Am. Law Reg.* (*N. S.*), 506, the same construction is placed upon the act by Drummond, J. (concurred in by Blodgett, J.), as by Mr. Justice Bradley.

See also Nixon, J., in *N. J. Zinc Co.* v. *Trotter*, 17 *Am. Law Reg.* (*N. S.*), 376, which seems to take the same view. See, also, Dillon & Dundy, JJ., in *Sands* v. *Smith*, 1 *Dillon*, 290, and Mr. Justice Miller, in *Johnson* v. *Monell*, 1 *Wool.*, 390.

Mr. Justice Swayne, in the case of *Frazer*, 18 *Alb. Law J.*, 353, held that it was not removable under the act of 1875. But he did not examine the questions which have been discussed above. He held that the Federal Courts have no probate jurisdiction; and, further, in that case, the petition for removal was made by only a portion of the parties on one side, and the controversy was not wholly between them and the other party. We coincide in the conclusion of Mr. Justice Swayne that that case was not removable, for the reasons stated above.

VIII.—On the subject of the scope of the power of Congress under the Constitution, we think there can be no question. The jurisdiction, where there is a controversy between citizens of different states, given, through the Constitution, by the states themselves, must be construed to include the right to take cognizance of such controversies, though other parties may be involved; otherwise, the delegation of power would be futile, and the very object thereof be defeated in many cases And no such narrow construction can be applied to this delegated power as is sought to be placed upon it. The language, if such has been the intention, would not have been general, but would have limited the jurisdiction to the cases mentioned.

IX.—The fact of the Taft case having been previously tried, offers no obstacle to the removal.

The act of 1875, expressly includes pending cases.

Insurance Company v. *Dunn*, 19 *Wall*, 214.
Chicago & North Western Railway Co. v. *McKinley. U. S. Sup. Ct., Oct. term*, 1878, *referred to in* 18 *Am. Law Reg.* (*N. S.*), 462.
Merchants & Mf. N. Bk. v. *Wheeler*, 13 *Blatch.*, 218.
Warner v. *Penn. R. R. Co.*, 13 *Blatch.*, 231.
Andrews v. *Garrett*, 2 *Cent. Law J.*, 797.
Johnson v. *Monell*, 1 *Woolw. C. C. R.*, 390.
Akerly v. *Vilas*, 2 *Bissell*, 110.
Petillon v. *Noble*, 15 *Alb. Law J.*, 472.

X.—In *Gaines* v. *Fuentes*, 92 *U. S. Sup.*, 10, this court held that it rested entirely with Congress to determine at what time the power might be invoked, and upon what conditions, and at what stage of the proceedings.

XI.—The following decisions of the State Courts on this point, being against their own jurisdiction, are entitled to great respect.

Rathbone Oil Tract Co. v. *Rauch*, 5 *West Va.*, 79.
Burson v. *Nat. Park Bank*, 40 *Ind.*, 173.
Dart v. *Wheeler*, 43 *How. P. R.*, 29, 32.
Clark v. *Delaware & H. Canal Co.*, 11 *R. I.*, 36.

XII.—The Petterson case could not have been tried between March 3, 1875, and the date of the removal.

The stipulation, which was acquiesced in, and regarded as binding on both parties, prevented a trial. Neither party had the power to bring on the cause. The proceedings were stayed by agreement, which was much more effectual even than an order of the court, as the latter was subject to be vacated or modified.

Warner v. *Penn. R. R. Co.*, 13 *Blatch*, 231.

XIII.—It is immaterial that the change of residence took place pending the suit. The parties are to be regarded as the law of 1875 found them. It refers to suits "*now pending*," in which there *shall be* "a controversy," &c.

This was the view taken under the act of 1867.

Mr. Justice Miller, in Johnson v. *Monell*, 1 *Woolw. C. C. R.*, 390.

The effect is very different from the case of a change of residence, while the suit is in the U. S. Court. There could be no removal from that to a State Court, and should be none, because the jurisdiction of the Federal Court is paramount when once acquired, while that of the State Court is subject to the right of removal.

XIV.—Further, the defendants are sued as *tort-feasors* and, as to such, the suit is several. It could be fully determined as to each one.

Betts v. *Hillman*, 15 *Abb. P. R.*, 184.
4 *Abb. N. Y. Dig.*, *p.* 685., § 822.

XV.—It is submitted that the orders of the judge below were erroneous, and should be reversed.

JAMES S. STEARNS,

Of Counsel for Plaintiffs in Error,

74 Broadway, New York.

Filed
Oct 29. 187

IN THE

SUPREME COURT OF UNITED STATES.

Appeal from the United States Circuit Court for the District of Iowa.

THE DELAWARE R. R. CONSTRUCTION CO. AND DELAWARE COUNTY R. R. CO. APPELLANTS,

—*vs.*—

LEWIS H. MEYER and WILLIAM DENNISON, Trustees, APPELLEES.

No. 209.

BRIEF OF E. WALKER,

Attorney.

CHICAGO:
PRESS OF BEACH, BARNARD & CO., LEGAL PRINTERS, NO. 104 RANDOLPH STREET.

1879.

IN THE

SUPREME COURT OF UNITED STATES.

No. 209.

THE DELAWARE R. R. CONSTRUCTION CO. AND DELAWARE COUNTY R. R. CO. APPELLANTS,
—*vs.*—
LEWIS H. MEYER and WILLIAM DENNISON, Trustees, APPELLEES.

Appeal from the United States Circuit Court for the District of Iowa.

BRIEF BY E. WALKER, ATTORNEY.

By order of this court, entered at its October Term, 1878, leave is granted counsel in other cases pending in this, or in the Circuit Courts, in which the construction of the removal act of March 3d, 1875, is involved, to file briefs in this and the two other cases, substantially between the same parties. As I understand the order, counsel must confine their arguments to the questions involved, and the errors assigned in the cases in which the order was entered.

As counsel for plaintiff in error in case No. 870, error to the Circuit Court for the Northern District of Illinois, I beg leave to submit a few suggestions and authorities. In the case last referred to the plaintiffs (defendants in error), in June, 1877, commenced their action in the State

Court, and at once filed their petition for the removal of the cause under the act of March, 1875. The State Court denied the motion for the reason that the Federal Court had not original jurisdiction over the subject matter of the action, and, therefore, held that the cause was not removable. Thereupon the plaintiffs procured and filed a transcript of the cause in the office of the clerk of the Federal Court, and thereafter both courts claimed jurisdiction of the cause. One year thereafter, June, 1878, the defendant caused a rule to be entered in the cause in the State Court, that the plaintiffs should file a replication on the day named. The plaintiffs appeared, and discharged the rule, and at the same time presented a new petition under the same act for the removal of the cause. This petition was not in apt time, and was denied. Subsequently the cause was called for trial, both parties appearing by counsel, a jury impaneled, a trial had, resulting in a judgment for the defendant. The record shows that *after* the plaintiffs had filed their replication and new petition for removal, and *after* the jury had been called, they entered their protest against the jurisdiction of the State Court. After the trial and judgment in the State Court, the defendant specially appearing in the Circuit Court, presented the full record of the State Court, and thereupon moved to dismiss and strike from the calendar the cause then upon the trial docket of the Circuit Court. The court denied the motion, holding, among other things, that notwithstanding the appearance of the plaintiffs in the State Court, and the trial of the cause in June, 1878, that the Circuit Court had acquired full and exclusive jurisdiction of the cause under the removal of June, 1877, and that the subsequent proceedings, trial in, and judgment of, the State Court, were void for want of jurisdiction.

I have made this brief statement from the record for the purpose of showing the importance of the questions

arising under the errors reserved in cases Nos. 209 and 210. In each of these cases it appears that after final decrees had been entered by the State Court, the transcripts of record were filed in the Circuit Court, and that at a subsequent hearing the Circuit Court entered a final decree, declaring substantially that the proceedings and judgments of the State Court were void for want of jurisdiction. In all these cases the learned judges of the Circuit Court have assumed supervisory or appellate jurisdiction over the judgments of the State Courts, and look to the act of March, 1875, for their power and authority. It is against this exercise of judicial power that protests come to this court, from every judicial circuit, and while we cheerfully admit the appellate jurisdiction of this court, in all proper cases, over the judgments of State Courts, we as earnestly deny the more recent claim to, and the exercise of, this power by the Circuit Courts.

Let us refer to case No. 210. On the 10th of January, 1874, this action was commenced in the Delaware County Circuit Court. Different proceedings were had, and various orders entered until May 19th, 1875, when said court had complete jurisdiction over the subject matter of the action, and all parties thereto. On that day the defendants filed a petition and motion for the removal of the cause to the Federal Court. The motion was denied, and a final decree entered in favor of the plaintiffs, on the 22d day of May, 1875. On the 9th day of October, 1875, the defendants filed a transcript of the cause in the office of the clerk of the Circuit Court, and invoked the jurisdiction of that court. The Circuit Court held the jurisdiction over the objections of the plaintiffs, and on the 8th day of June, 1876, entered a final decree in favor of the defendants, and declaring the judgment of the State Court null and void.

It appears from the record, that at the time of the entry

of the final judgment in the State Court, jurisdiction was with that court, if anywhere. The filing of the petition did not oust the court of jurisdiction, but rather operated as a stay of its proceedings. The Circuit Court could make no claim to jurisdiction until the record was lodged in the office of its clerk, and this was not done until several months after final judgment of the State Court. Where was the jurisdiction of the cause during this interim? Certainly it was not in the Circuit Court; if the case was pending any where, it was in the State Court.

In these, as in other cases, petitions for removals are presented to the State Courts. Motions are made and judgments invoked. It seems to be conceded that the State courts have power to enter an order of removal, but when the judgment of the court is adverse to the prayer, the Circuit Courts hold that there is a total want of jurisdiction.

We have not examined these petitions. Whether they are sufficient or otherwise, is not material to the question we desire to present.

What we are contending for is, that the filing of the petition did not oust the State Court of its jurisdiction—that it did not invalidate the judgment entered at a later date—that such judgment was not a nullity until declared so by a court of superior and appellate jurisdiction; and that such jurisdiction is not, and never has been vested in the Circuit Courts of the United States. The jurisdiction and power of the Circuit Court is, at most, only the equivalent of that of the State Court. It is, in no sense, appellate or advisory. Their jurisdiction in these cases is co-equal, and the judgment of the State Court has the same validity, and is entitled to the same respect as the judgment of the Circuit Courts.

The State Court having acquired jurisdiction of the

parties and subject matter, its judgments are valid until reversed by a court of superior or appellate jurisdiction.

In both cases jurisdiction was first vested in the State Court, and if errors have been there committed, the Circuit Court is not a proper forum for their review; no judgment of the Circuit Court can modify, much less nullify, the judgment of the State Court.

" Having obtained jurisdiction over the person and over " the subject matter, no error in its exercise can make the " judgment void."

Freeman on Judgments, Sec. 135.

In *Peck et al.* v. *Jenness et al.*, 7 Howard, p. 612, it is *held*, that " when a court has jurisdiction, it has the right " to decide every question that occurs in the cause, and " whether its decision be correct or otherwise, its judg- " ment, until reversed, is regarded as binding in every " other court, and that the District Court has no super- " visory power over the State Court "; also, in *Riggs* v. *Johnson County*, 6 Wallace, 195, it is held, "that State " Courts are exempt from all interference by the Federal " tribunals, but they are destitute of all power to restrain " either the process or proceedings in the National Courts. " Circuit Courts and State Courts act separately and in- " dependently of each other, and in their respective " spheres of action, the process issued by the one, is as " far beyond the reach of the other, as if the line of divis- " ion between them was traced by landmarks and monu- " ments visible to the eye. *Appellate relations exist in a* " *class of cases between the State Court and this Court, but* " *there are no such relations between the State Courts and* " *the Circuit Courts.*"

These questions were of frequent occurrence under the removal acts prior to that of 1875. Under those acts, the defendant was the moving party, and when his petition

was denied, his only remedy, under the Judiciary Act, was by appeal to the State Supreme Court, and if its judgment should be adverse, then by writ of error to the Supreme Court of the United States.

Until the Circuit Courts put forward their claim to extended jurisdiction, and enlarged powers under the Act of 1875, this had been the uniform practice of the Circuit Courts, and is yet, so far as we have any knowledge, the only rule of practice authorized by this court.

The petition to remove these causes from the State Court, was submitted to the State Court, and decided against the petitioners.

That court was competent to pass upon the question, and its decision cannot be reviewed by the Circuit Court. The denial of the petition left the case in the State Court, even though the court may have erred in its denial. The petitioners could save the question by exception, and their remedy by appeal, or writ of errer was perfect, through the State Courts, and thence to the Supreme Court of the United States.

Dillon on the Removal of Causes, p. 18, note.

Bell v. *Dix*, 49 N. Y., 232.

Fiske v. *Union Pacific Railroad Company*, 6 Blatchford, 362–400.

Our second proposition is, that conceding the petition for removal to be sufficient, and that the refusal of the State Court to grant the motion was error, a subsequent *voluntary* appearance of the moving party in the State Court is a waiver of his right — that upon and after such appearance the State Court has complete jurisdiction over the person of the party, and its judgments, until reversed by a court of superior jurisdiction, are valid and should be respected by all other courts.

In every removable action, it is the privilege of the party to elect whether the cause shall be heard in the Federal or State Court; but certainly he has no right to a trial in both; nor can he experiment between the two courts.

In the State Court consent gives jurisdiction. Jurisdiction in that court is general; in the Circuit Court, it is limited and special; and therefore here consent cannot give jurisdiction over the subject matter. A party may waive even a constitutional right, and the voluntary appearance of a party in the State Court after the attempted removal of the cause into the United States Court is a submission to that jurisdiction.

In *Bushnell* v. *Kennedy*, 9 Wall., 387, it is held that where a party appears in court by consent, or by his own act, it is a waiver of exceptions to the jurisdiction.

In *Jones* v. *Andrews*, 10 Wall., p. 327, the same principle is upheld. There was a question of jurisdiction over the defendant, Andrews, who was a citizen of the State of New York; the suit was brought in the State of Tennessee; Andrews appeared and objected to the jurisdiction of the court, and the bill was dismissed. The Supreme Court say:

"It is true, that as soon as he (Andrews) appeared, he "moved a dismissal of the bill on two grounds:

"(1.) That it did not show such facts in regard to citi- "zenship, or residence of the defendants, as to give the "court jurisdiction.

"(2.) That it contained no equity. Whether, if he had "made the motion on the first ground alone, he would "have waived his personal exemption, it is not necessary "to decide. *His moving to dismiss the bill for want of* "*equity is a clear waiver*, and he was properly required to "answer the bill. After this the question of jurisdiction "over the person was at an end."

In Dillon on Removals, p. 73,

" A party entitled to a removal may estop himself to ap-
" ply for it; or, having applied, may waive the right to a
" removal by his subsequent action in the State Court."

Under the earlier removal acts, the defendant alone had the right of removal. If he desired to avail himself of the right, he was required to do so in apt time, and before he had accepted the jurisdiction of the State Court. The distinction between his voluntary and involuntary appearance was always carefully recognized; but this Court has never relieved a party from the legal results of a voluntary appearance.

Under the act of 1875, the plaintiff has the right of removal, but it is very hard to understand how his appearance in any cause can be other than voluntary, or why he should not be estopped from denying the validity of a judgment entered against him, upon his prosecution of an action in the State Court after the refusal of his petition to remove, except in a court of appellate or superior jurisdiction; yet circuit courts have declared such judgments nullities, and forced the defendants to the annoyance, costs and burden of a second trial.

In *Cromwell* v. *County of Sac*, 4 Otto, p. 351, it is held that a judgment upon the merits constituted an absolute bar to another action between the same parties upon the same claim or demand.

In *Corcoran* v. *Chesapeake Canal Co.*, 4 Otto, 741, the same rule is applied where the former adjudication was by a State Court.

Lessee of Parish v. *Ferris et al.*, 2 Black, 606.

This is a writ of error to the Circuit Court of the United States for the Southern District of Ohio.

The action was ejectment to recover possession of cer-

tain parcels of land situate in Hamilton County. The defendants set up, in bar of recovery, a previous suit between the same parties in the courts of the State of Ohio, involving the same title, and in which a judgment or decree was rendered in their favor.

Held: This Court acknowledges the rule, and has uniformly applied it, of the conclusiveness of a judgment of a court of concurrent jurisdiction between the same parties, or their privies, upon the same question.

In the case at bar, the lower courts are of concurrent jurisdiction; final judgment had been rendered in the State Courts before any claim of jurisdiction in the Circuit Courts had been, or could have been made; and applying the "uniform rule," the judgment of the State Court was a complete bar to the proceedings in the Circuit Court.

That there is to be a general construction given by this Court of the act of 1875, will be a great relief to the lower courts, National and State, as well as to the bar.

At the present date there is no uniform rule of practice in the Circuit Courts. Each judge has followed his own convictions, in many cases wholly disregarding the rules of decision under the former acts, believing that the act of 1875 is radically different from all preceding legislation. This has caused great confusion, and, in many cases, much bitterness of feeling. In some instances, each court has claimed and held jurisdiction over the same actions, and has rendered final judgments therein, each adverse to the other. Then follow injunctional orders and writs from one jurisdiction restraining parties from proceeding in the other, and these writs, too often followed by proceedings of a *quasi* criminal character, each court properly zealous in the maintenance of its own jurisdiction. While the State Courts have yielded cheerful obedience to the judgments of this Court, they have become restive under the attempted

exercise of supervisory and appellate jurisdiction by the Circuit Courts. They have accepted without dissent, the rule in *Riggs* v. *Johnson County*, and ask that it be enforced against the Circuit Courts. "*That appellate relations exist in a class of cases between the State Court and this Court, but there are no such relations between the State Courts and Circuit Courts.*"

We beg to suggest further, that there is no ambiguity in the act of 1875, and nothing that should create uncertainty in practice.

Section first enlarges and extends the jurisdiction of the National courts, while section second provides for the removal of causes from State Courts. The right of removal is given the plaintiff as well as the defendant, and this we believe to be the only substantial change from former legislation ; all other changes are mere matters of method and practice. We submit that the rule of the State Courts, *that no cause is removable unless the Federal Court has original jurisdiction of the subject matter of the action* is sustained by authority of this Court—that in this respect the law is not changed by the act of 1875.

Upon this point we call your Honors' attention to a few leading cases :

Smith v. *Rines et al.*, 2d Sumner, 338.

This was an action of trespass on the case for defrauding the plaintiff in the purchase of certain lands situate in the State of Maine. Action originally brought in Court of Common Pleas, Worcester County, Massachusetts. Rines, one of the defendants, a citizen of the State of Maine, upon petition, moved the court for a removal of the cause into the Circuit Court of the United States. Plaintiff entered a protest against the removal. Removal was ordered by the court, with a stay of further proceedings in the State Court. Motion in the Circuit Court to remand,

upon the ground that it was not a removable cause under the act of Congress.

Held, JUSTICE STORY: "The 12th Section of the "Judiciary act of 1789 provides that if a suit be com- "menced in any State Court against an alien, or by a citi- "zen of a State in which the suit is brought against a citi- "zen of another State, and the matter in dispute exceeds "the sum or value of $500, exclusive of cost, to be made "to appear to the satisfaction of the court, and the defend- "ant shall, at the time of entering his appearance in such "State Court, file a petition for the removal of the cause "for trial into the next Circuit Court to be held in the dis- "trict where the suit was pending, and offer good and "sufficient surety for his entering in such court, on the first "day of its session, copies of said process against him, and "also for his then appearing and entering special bail in the "cause, if special bail was originally requisite, then it shall "be the duty of the State Court to accept the surety, and "proceed no further in the cause, &c.; and the said copies "being entered in such court of the United States, the "cause shall then proceed in the same manner as if it had "been brought there by original process.

"It is apparent from the language of the closing pass- "age of the section above quoted that it contemplates such "cases, and such only, to be liable to removal, as might "under the law, or at all events under the constitution, "have been brought before the Circuit Court by original "process; and this consideration, under the actual state of "authorities, is most important.

"My brother, the late Mr. JUSTICE WASHINGTON, so "thought in the case of *Beardsley* v. *Torrey*, 4 Wash. C. "R. R., 286. 'If,' said he, 'this suit could not have "been maintained against S, under the 11th section of the "Judiciary act, if it had originated in this Court, it cannot "be removed into this Court under the 12th section, so as

" to subject that party to the jurisdiction of this Court.' "

The same doctrine was held in the case of *Strawbridge* v. *Curtis et al.*, 3 Cranch, 267. Referring to that case, Judge STORY says :

" The case of *Strawbridge* v. *Curtis* has never been de-
" parted from, but has constantly been recognized as the
" basis of subsequent decisions of the Supreme Court
" upon this branch of jurisdiction.

In the case of *Ward* v. *Arredondo*, 1 Paine, 410, Mr. Justice THOMPSON held :

" It is very evident that Ward, the plaintiff, could not
" originally have filed his bill in this court against Thomas as one of the defendants, and it would seem to follow, as a
" necessary consequence, that if jurisdiction could not have
" been entertained directly, it ought not to be acquired
" indirectly."

The principal adverse authority is *Gaines* v. *Fuentes et al.*, 92 U. S., p. 10. This action was brought to the Supreme Court by writ of error to the Supreme Court of the State of Louisana. The action was originally brought in a local court in the parish of New Orleans, to ~~annul~~ amend the will of Daniel Clark, the father of the plaintiff in error. Mrs. Gaines filed her verified petition with proper averments for the removal of the cause, under the Prejudice act (so called) of 1867. The State Court held that the Federal Court had no original jurisdiction over the subject matter, and that the case was, therefore, not removable.

This was the principal question presented and discussed. The Supreme Court held that the Federal Court had original jurisdiction. The particular law under discussion was the act of 1867. Mr. Justice FIELD, in his opinion after referring to the preceding legislation upon the subject of removals, says:

" But the experiences of parties immediately after the

"late war, which powerfully excited the people of differ-
"ent States, and, in many instances, engendered bitter
"enmities, satisfied Congress that further legislation was
"required fully to protect litigants against influences of
"that character."

This act, then, in the opinion of the court, was passed to meet a peculiar condition of society—a feeling of intense bitterness between the citizens of different States, that happily does not now exist. It was a construction of a special law, essentially different from the act of 1875.

The court held that there was original jurisdiction; that the case was removable under the act of 1867, "even "though it should be admitted that that court could not "have taken original jurisdiction." *Smith* v. *Rines*, 2 Sumner, is approved as a correct construction of the law as it stood prior to the act of 1867 :

"No case could then be transferred from a State Court "to a Federal Court, on account of the citizenship of the "parties, which could not have been originally brought in "the Circuit Court."

The right of removal is here claimed under the act of 1875. This act does not authorize a removal not provided for by legislation prior to the act of 1867, and by the act specially under consideration by Mr. Justice STORY, in *Smith* v. *Rhines*.

The essential change of the former acts by that of 1875 is in giving the right of removal to both parties, and changing the time of application or presenting the petition. The law of 1789 provided that *any case* where the controversy was between citizens of different States, and the amount in controversy exceeds the sum of five hundred dollars, may be removed -- and under the act of 1875 *any suit* may be removed, &c., &c.

The first section of the act of 1875 defines and enlarges

the original jurisdiction of the Circuit Courts; and section two of the act relates to removals. Judge DILLON, in "Removal of Causes," p. 27, construing this act, says :

"As to suits which may be removed, it follows the "language of the first section : so that it is true in general "that any cause may, at the proper time, and in the pre- "scribed mode, be removed from the State Court to the "Circuit Court of the United States, which, by reason of "the subject matter, or the citizenship of the parties, "might have been instituted originally in the Federal "Court."

It would seem to be the opinion of Judge DILLON that under the law of 1875, only such cases are removable as come within the original jurisdiction of the Circuit Court.

In *Taylor* v. *Rockafellow*, a recent case in the United States Circuit Court, Western District of Pennsylvania, not yet reported, the question of right of removal under the act of 1875, is very fully discussed by Mr. Justice STRONG. The case had been removed from the State Court, and, upon a motion to remand, the court, upon this precise question, held: "Whatever may have been the "doctrine held prior to the Act of Congress of 1875, that "act has introduced great changes of the law. The first "section extends the jurisdiction of the circuit courts, "nearly, if not quite, as far as the second section of the "third article of the Constitution authorizes, alike in regard "to the subject matter of the suit, and the citizenship of "the parties. It adopts the words of the Constitution. "The second section relates to the removal of suits from "the State Courts into the United States Circuit Courts, "and it follows the language of the first section. *Hence*, "*any cause which might have been commenced in the Cir-* "*cuit Court, either because of its subject matter or the citi-* "*zenship of the parties, may be removed from the State* "*Court into a Federal one.*"

We therefore respectfully submit the following propositions:

That if the Circuit Courts have not original jurisdiction over the subject matter of the action, the cause is not removable. That section 2d of the act of 1875, authorizing removals, does not enlarge the jurisdiction of the Circuit Courts.

That in actions pending in the State courts, when either party presents a petition for removal and asks for an order thereon, the court has the jurisdictional power either to grant or refuse the petition, and that its action thereon can only be reviewed by a court of superior or appellate jurisdiction.

That if error is committed by the State court on a motion for removal, the remedy of the complaining party is by appeal to a court of appellate jurisdiction.

That the Circuit Courts of the United States have no supervisory appellate powers over the judgments of the State courts, and can neither modify nor annul such judgments.

That the right of removal is a personal right or privilege, that may be waived by the party, either before or after the filing of the petition.

That a party entitled to a removal may estop himself to apply for it; or, having applied, may waive the right to a removal by his subsequent action in the State court.

E. WALKER,

CHICAGO, September 25, 1879. *Attorney.*

Filed Oct. 29.

Supreme Court

OF THE UNITED STATES.

THE DELAWARE RAILROAD CONSTRUCTION COMPANY *et al.*

vs.

LEWIS H. MEYER *et al.*

No. 209, OCTOBER TERM, 1878.

Argument as to the Constitutional Jurisdiction of the Federal Courts over Controversies between Citizens of different States.

Filed by leave, under order of the Court, by

MELVILLE C. DAY.

U. S. Supreme Court.

THE DELAWARE CONSTRUCTION CO., *et al.*,

vs.

LEWIS H. MEYER, *et al.*

Conceiving that this case may involve a construction by the Supreme Court of that clause of the Constitution of the United States which confers to the Federal Courts jurisdiction over controversies between citizens of different States, and being engaged in a case in this Court, and also in a case in a Circuit Court of one of the districts of Missouri, in which the construction of that clause is involved, we submit, under the leave of the order made in this case, the following views as to the construction of the clause referred to:

PROPOSITION.

THE JUDICIAL POWER AS EXTENDED OVER CONTROVERSIES BETWEEN CITIZENS OF DIFFERENT STATES BY THE FEDERAL CONSTITUTION, AND AS DELEGATED TO THE CIRCUIT COURTS OF THE UNITED STATES BY THE ACT OF CONGRESS APPROVED MARCH 3D, 1875, AUTHORIZES THOSE COURTS SUBJECT TO THE SPECI-

FIED LIMITATION AS TO VALUE IN DISPUTE, TO ASSUME JURISDICTION OF ALL CASES ORIGINATING THEREIN OR REMOVED THERETO IN COMPLIANCE WITH THE ACT, IN WHICH ANY SUBSTANTIAL ISSUE IS INVOLVED, EXISTING WHOLLY OR IN PART BETWEEN CITIZENS OF DIFFERENT STATES.

ARGUMENT.

A discussion of the above proposition involves an inquiry as to the purpose and scope of the Federal judiciary powers.

SECTION 2 ARTICLE III. of the Constitution declares that "the judicial power shall extend to all "cases in law and equity arising under this Constitution, the laws of the United States, and treaties "made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty "and maritime jurisdiction; to controversies to "which the United States shall be a party; to controversies between two or more States; between a "State and citizens of another State; between citizens of different States; between citizens of the "same State claiming lands under grants of different States, and between a State or the citizens "thereof, and foreign States, citizens or subjects."

As declared by Mr. Justice Story, the safest rule of the interpretation of the Constitution is, "to look "to the nature and objects of the particular powers "duties and rights, with all the lights and aids of "cotemporary history, and to give to the words of "each, just such operation and force consistent with "their legitimate meaning as may fairly secure and "attain the ends proposed."

Prigg *v.* Penn, 16 Peters, 610.

Some of the cardinal objects proposed by the Constitution, and which have been recognized as having specially induced the granting of the judicial powers, are stated in the preamble to that instrument as being "to form a more perfect union, establish justice and insure domestic tranquility."

There is nothing to be derived from the language of the instrument itself, from its cotemporary history or its subsequent exposition that will authorize the conclusion that the jurisdiction over controversies between citizens of different States is not founded on as high motives of State policy and public justice as any of the other judicial powers, or that it is not entitled to be as liberally construed, and as vigilantly guarded.

Resorting to the Federalist as containiug an accredited cotemporary exposition of the purposes sought to be achieved by the framers of the Constitution, we find that the author of the article (No. 80), concerning the extent of the judicial powers, states that the judiciary power ought to extend to certain enumerated classes of cases, and among them; "to all those which involve the peace of the "confederacy, whether they relate to the intercourse "between the United States and foreign nations, or "to that between the States themselves,' and also "'to all those in which the State tribunals cannot "be supposed to be impartial and unbiased.'"

Among the classes of cases which the author includes in the judiciary power as involving "the peace of the confederacy," are those relating to treaties made, or which shall be made under the authority of the laws of the United States, those affecting ambassadors, other public ministers and consuls, controversies between two or more States, between a State and citizens of another State, between citizens of different States, and to those between a State or the citizens thereof and foreign States, citizens or subjects.

He further allots controversies between citizens of the same State, claiming land under grants of different States, as falling in the class of cases "in which the State tribunals cannot be supposed to be impartial and unbiassed;" and says that while controversies between two or more States, between a State and citizens of another State, and between citizens

of different States, *belong* to the class affecting the peace of the confederacy, they *also partake in some measure* of the nature of the cases, "in which the State tribunals cannot be supposed to be impartial."

Discussing the importance of the judicial powers, it is said by the same writer "the reasonableness of "the agency of the national courts in cases in which "the State tribunals cannot be supposed to be impar- "tial, speaks for itself. No man ought, certainly, to "be a judge in his own cause or in any cause in re- "spect to which he has the least interest or bias. "This principle has no inconsiderable weight in "designating the Federal Courts as the proper tri- "bunals for the determination of controversies be- "tween different States and their citizens.

"And it ought to have the same operation in re- "gard to some cases, between the citizens of the "same State. Claims to land undergrants of dif- "ferent States, founded upon adverse pretentions "of boundary, are of this description. The Courts "of neither of the granting States could be expected "to be unbiassed. The law may have even pre- "judged the question and tied the Courts down to "decisions in favor of the grants of the State to "which they belonged, and where this had not been "done it would be natural that the judges as men "should feel a strong predilection to the claims of "their own government."

Referring to the class of cases which "involve the peace of the confederacy," it is further said that they rest "on this plain proposition, that the peace "of the whole ought not to be left at the disposal of "a part. The Union will undoubtedly be answera- "ble to foreign powers for the conduct of its mem- "bers. And the responsibility for an injury ought "ever to be accompanied with the faculty of pre- "venting it. As the denial or perversion of justice "by the sentences of courts, is with reason classed "among the just causes of war, it will follow that "the Federal Judiciary ought to have cognizance of "all causes in which the citizens of other countries "are concerned. This is not less essential to the "preservation of the public faith, than to the secu "rity of the public tranquility. A distinction may

"perhaps be imagined, between cases arising upon "treaties and the laws of nations, and those which "may stand merely on the footing of the municipal "law. The former kind may be supposed proper "for the Federal jurisdiction—the latter for that of "the States.

"But it is at least problematical, whether an un-"just sentence against a foreigner, where the subject "of controversy was wholly relative to the *lex loci*, "would not, if unredressed, be an aggression upon "his Sovereign, as well as one which violated the "stipulations of a treaty, or the general law of na-"tions. And a still greater objection to the dis-"tinction would result from the immense difficulty, "if not impossibility, of a practical discrimination "between the cases of one complexion and those of "another. So great a proportion of the controver-"sies, in which foreigners are parties, involve na-"tional questions, that it is by far most safe, and "most expedient, to refer all those in which they are "concerned to the national tribunals.

"The power of determining causes between two "States, between one State and the citizens of another, "and *between the citizens of different States*, is per-"haps *not less essential* to the peace of the Union, "than that which has been just examined." * * "* * * "It may be esteemed the basis of the "Union, that the citizens of each State shall be en-"titled to all the privileges and immunities of "citizens of the several States. And if it be a just "principle, that every government ought to pos-"sess the means of executing its own provisions, "by its own authority, it will follow, that in order "to the inviolable maintenance of that equality of "privileges and immunities, to which the citizens of "the Union will be entitled, the national judiciary "ought to preside in all cases, in which one State "or its citizens are opposed to another State or its "citizens. To secure the effect of so fundamental "a provision against all evasion and subterfuge, it "is necessary that its construction should be com-"mitted to that tribunal, which, having no local "attachments, will be likely to be impartial, be-"tween the different States and their citizens, and "which, owing its official existence to the Union, "will never be likely to feel any bias inauspicious "to the principles on which it is founded."

Such are the reasons that were assigned for the granting of these judicial powers, while the constitution was yet pending, and which were presumably accepted as sufficient and satisfactory by the people when they adopted the instrument.

Mr. Justice Story, after detailing some of the reasons that he supposed to have influenced the convention in delegating jurisdiction to the Courts of the United States in controversies between citizens of different States says: "Probably no part of the "judicial power of the Union has been of more "practical benefit, or has given more lasting satis- "faction to the people. There is not a single State "which has not, at some time, felt the influence of "this conservative power; and the general harmony "which exists between the State Courts and the "National Courts, in the concurrent exercise of "their jurisdiction in cases between citizens of dif- "ferent States, demonstrates the utility, as well as "the safety of the power. Indeed, it is not improb- "able that the existence of the power has operated "as a silent but irresistible check to undue State "legislation, at the same time that it has cherished "a mutual respect and confidence between the "State and national Courts, as honorable as it has "been beneficent."

We are thus led to the conclusion that the prominent motives that induced the granting of the judicial power to cases involving the interpretation of treaties made with other governments, affecting the ambassadors of other nations, or involving disputed boundary claims between different States of the Union, *all concurred* to induce the extending of that power to controversies between citizens of different States.

And not only the motives referred to, but the very letter of the Constitution, requires that the same jurisdictional latitude must be given to con-

troversies between citizens of different States, as to those in which a State of the Union or a foreign nation may be involved as an interested party.

Under this state of facts we claim that the intended scope of the judicial powers, considered singly or collectively, can never be satisfied with any construction, that does not accede the constitutional jurisdiction as extending to a controversy which involves any substantial issue existing wholly or in part between citizens of different States, regardless of the fact that there may be citizens of the same State opposed as parties in interest therein.

It is submitted that if the evils anticipated and sought to be averted by the framers of the constitutional compact were real, and not purely fancied, then every individual litigant who is partially interested in any pending controversy is just as much entitled, to the extent of his interest, to be shielded by the jurisdictional power, as though he had no associate party, and no one to share with him the advantages or respond to the liabilities of the issue raised; and in a case where the defendants are charged with a joint and several liability, the extent of his liability and the need of the jurisdictional protection would be precisely the same in one case as in the other.

But it has been contended that the apprehended dangers do not exist where citizens of the same State are on both sides of the controversy for the reason that the local prejudice or influence is thereby balanced or destroyed.

It is hardly to be supposed that any scales of justice would be so nicely adjusted as to stand evenly poised while weighing the exerted influence of a prejudice on the one side as against favoritism on the other.

It is, however, to be observed that the citizens of the same State, need not be citizens of the State in

whose Court the case is tried. And if A. of Missouri and B. of Illinois bring a suit in one of the State Courts of Missouri against C. of Illinois and D. of New York, it is not apparent how any favoritism felt toward A., or any prejudice against D. would be destroyed or balanced by the presence, as parties in the suit, of the two citizens of Illinois towards whom the local feeling might be one purely of indifference.

But suppose the citizens of the same State, who are on opposite sides of the controversy, belong to the State where the suit is tried, the position referred to is still untenable; for it is well known that a prejudice or a bias toward one of a number of persons united for a like purpose or engaged in a common enterprise, is certain to affect his associates. In any event there are a large number of cases where such supposed protection would be entirely illusory. For instance, A. brings a suit against B., a citizen of his own State, and C, a citizen of a different State, averring a joint and several liability. Under the strict construction that has been contended for, the Federal Court would have no jurisdiction. The case is, we will suppose, tried in the State Court, and at the trial a judgment or decree is given in favor of B. and against C. It is seen that C. would at the last be exposed to all the apprehended disadvantages arising from a trial had by a citizen in one of the Courts of his own State against a non-resident. In fact the existence of a bias in favor of the one defendant and of a prejudice against the other, would tend to work a decision in favor of the former, to the end that the latter might be the more effectively reached by the hostile feelings arrayed against him. And under the restricted construction claimed, such results could not be averted, whether the resident citizen is made defendant collusively or in good faith. For it would be an anomaly in judicial practice for a Court to try a case on the merits, in order to determine whether it had jurisdiction to try it at all.

It is true, however, under the rule of construction we contend for, that it might happen in the case supposed that the non-resident defendant would at the trial be the successful party, and hence the Federal Court that had assumed the jurisdiction would be trying a controversy, which, as developed, would be found to exist only between citizens of the same State.

To this and other like objections that may perhaps be cited, it may be answered: 1st. That as the national courts must be admitted to be impartial tribunals for the trial of causes between the citizens of the same State, no harm can befall either party by the assumption of jurisdiction over them. 2nd. It is essentially the same result that often arises in cases where the federal courts exercise their jurisdiction in passing upon various matters of contention, which are not within the purview of any of the judicial powers, simply because the declaration or complaint presents some issue, and it may be an uncontested one, arising under the enumerated subject matters of the judicial powers. 3rd. This very objection was anticipated and answered, while the question of the adoption of the constitution was yet pending when it was said (Federalist, No. 80), "If some partial inconveniences should appear to "be connected with the incorporation of any of the "powers of the federal judiciary into the plan of "the system, then it ought to be recollected that the "national legislature will have ample authority to "make such *exceptions*, and to prescribe such regu-"lations as will be calculated to obviate or remove "these inconveniences. The possibility of par-"ticular mischiefs can never be viewed by a well "informed mind as a solid objection to a principle "that is calculated to avoid general mischiefs, and "to obtain general advantages."

The jurisdiction as extended by the constitution over "controversies between citizens of different

states" is phrased in the same language as that over "controversies between two or more states; between a State and citizens of another State; and between a State or the citizens thereof and foreign States, citizens or subjects." It follows, then, necessarily that if in the one case the federal jurisdiction can only attach when the controversy is wholly between citizens of different states, then in the other cases the controversy must also be wholly between the parties named in order to confer the jurisdiction.

The result of such a rule of construction would be that the federal court could never take jurisdiction of a case instituted by one State against another, conjointly with one of its own citizens, whatever the importance or magnitude of the issues involved: and that, too, notwithstanding the fact, as stated by the eminent Commentator on the constitution, that the jurisdiction of the federal courts over controversies between two or more States, seemed to be *essential to the preservation of the peace of the Union;* shown to be so from the history of other nations: also from the experience of the States before the adoption of the constitution, when very irritating and vexatious controversies existed between several of the States in respect to soil, jurisdiction and boundary, and threatened the most serious public mischiefs.

Story on the Constitution, § 1679, § 1680.

In like manner it would follow that the federal jurisdiction could not attach to a suit instituted by a a State against one of its own citizens together with any number of citizens of other States: and yet the judicial power was extended over controversies between a State and the citizens of another State to prevent practices *that might have a tendency to distract the harmony of the States.* Bickerings and animosities had previously sprung up among the members of the Union, and though other clauses

of the constitution established particular guards against the repetition of the cases, that had previously made their appearance, yet the apprehension was regarded as warrantable, that the spirit that produced them would assume new shapes that could not be foreseen nor specially provided against, otherwise than by providing an impartial tribunal for the trial of all controversies between a State and citizens of another State.

2 Story on the Constitution, § 1682.

So also the judicial power would not extend to a case in which a foreign nation, or one of its subjects should sue an alien, together with a citizen of one of the States. But the jurisdiction over "controversies between a state or the citizens thereof and foreign states, citizens or subjects" has been declared to be not less *essential to the preservation of the public faith than to the security of the public tranquillity.* It is of great national importance in the one case as advancing public as well as private credit in our intercourse with foreign nations and their subjects, and in the other to avert unjust decisions against foreigners which might, if unredressed, be regarded as aggressions upon their sovereigns, even though the cases involved only questions of municipal law.

2 Story on the Constitution § 1697, § 1698.

The same rule of construction would also require as a requisite to the federal jurisdiction over controversies among citizens of the states originating in claims to lands under grants of different states, that the controversy should be either wholly between citizens of different states, or wholly between citizens of the same state. A common citizenship of any state of any two adverse parties would oust that jurisdiction which was intended to provide an unbiassed tribunal for the trial of such cases, with the assurance that it "*would have a most salutary tendency in quieting the jealousies and disarming*

the resentments of the state whose grant should be held invalid."

2 Story on the Constitution, § 1696.

It seems hardly credible that the framers of the constitution in view of the recognized motives that actuated them in creating the judicial powers could ever have intended or imagined, that the grant of those powers were not sufficiently comprehensive to cover the classes of controversies that we have instanced.

The clause of the constitution extending the judicial power "to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made under their authority" has been decided as authorizing jurisdiction, whenever any question arising from the sources designated, forms an original ingredient in the cause, even though no issue may be raised thereon, and the case may be tried and decided entirely on other controverted issues of fact or law which within themselves could not impart jurisdiction. "Those other questions "cannot arrest the proceedings. Under this con- "struction the judicial power of the Union extends "effectively and beneficially to that most important "class of cases which depend on the character of "the cause."

Osborn vs. *The Bank of the U. S.* 9 Wheaton, 738.

It has already been indicated that the judicial power over controversies between citizens of different States stands at a common altitude, with those to which the above doctrines enumerated by Chief Justice Marshall were declared applicable, so far as regards their importance to the well being of the Union, the establishment of justice and the preservation of the national tranquility.

Unless restrained by the language of the grant they should receive a like comprehensive construction; and the language permits of no discrimination.

The power is conferred over any case arising *under*

the Constitution and the Laws of the United, &c., and over any controversy arising *between* citizens of different States; or, adopting the principle established in the case of Osborn *vs.* Bank of the U S., the power extends to any case arising wholly or in part under the Constitution, &c., and to any controversy arising wholly or in part between citizens of different States.

If UNDER, does not mean wholly under, then how can BETWEEN, be construed to mean wholly between?

In the one case the jurisdiction is sustained by a specified subject matter; in the other by a specified citizenship; the relative importance or extent of the subject matter or the citizenship as compared with any other subject matter or character of citizenship, is neither defined or qualified in either clause of the Constitution.

It has, however, been contended that where a controversy exists, partly between citizens of the same State, and partly between citizens of different States, that it is just as much a controversy between the one class of citizens as the other; and hence as the jurisdiction over controversies between citizens of the same State is impliedly reserved to the States, that there can be no propriety in extending the jurisdiction over this class of citizens who cannot be said to be *incidental* to the others.

But it is to be observed that the federal judicial powers are matters of express grant, and, as such, carry with them every thing necessary to make the grant efficient.

A case, because arising under the Laws of the United States, carries with it into the Federal Court all associate issues of fact and of common or municipal law, to the end that the power may act "effectively and beneficially." By parity of reasoning, a controversy between citizens of different States must attract and extend the federal jurisdiction over all the parties associated with them in the controversy.

It has been further claimed, as the clause of the constitution immediately succeeding the one now under discussion gives jurisdiction "to controversies between citizens of the same State claiming land under grants of different States," that the rule of *expressio unius est exclusio alterius* ought to apply, and hence that the Federal Courts ought not to assume jurisdiction of any class of controversies between citizens of the same State, other than those last named.

Would not the same rule, thus applied, oust the jurisdiction of all controversies between citizens of the same State "arising under this Constitution, the laws of the United States, and treaties made or which shall be made thereunder?" a position which would be certainly treated as untenable.

But it is evident that the clause referred to, bases jurisdiction upon the fact that land is claimed under grants of different States, and not upon the citizenship of the parties.

The other clauses of the section provide for jurisdiction over controversies between every conceivable class of parties except citizens of the same State: these as supplemented by the clause in question, became sufficient to effect the purpose of extending the judicial power over all cases involving adverse claims to lands under grants of different States.

The relative position of this, among the other clauses, is readily explained, if explanation is needed, by the fact that it was added to the original draft of the Constitution (4 Elliott's Debates, p. 160), and was the last amendment made to the clauses granting the judicial power; and so as an amendment it was the readiest and most natural method of perfecting the intended purpose of authorizing jurisdiction over all cases involving questions arising under grants of different States.

It is insisted, and by some Courts has been adjudged, that the word "controversy," as used in

the grant of the judiciary power, is synonymous with "suit;" and as it has been held under the Judiciary Act of 1879 giving jurisdiction where the "*suit* is between a citizen of the State where the *suit* is brought and a citizen of another State," that the suit must be wholly between citizens of different States; so it is argued that a controversy between citizens of different States must be wholly between the plaintiffs and the defendants in the suit, in order to sustain the jurisdiction conferred by the Constitution.

As has been attempted to be explained, such a rule of construction adhered to, and applied to "controversies," as named in the constitution, would result in an extended and grave impairment of the judicial powers. And it will be certainly unfortunate if this Court, in determining, as it now has to do for the first time, *the ultimate scope* of the federal judicial powers, finds itself constrained by reason of its former decisions to adopt such a rule of construction, as applicable to the power now considered.

But it is submitted that suits and controversies are not analogous; that the meaning of the latter within the purview of the constitution remains undefined by this Court, and open to be decided in such manner and upon such principles as may best accord with the purposes of the grant.

A careful reading of the clauses of the second section leads to the inference that the word CONTROVERSIES was used in distinction from the word CASES designedly and with a careful discrimination. Any other theory carries with it an implication that the change, as made in the use of these words, was simply with a view to some artful effect in the framing of sentences.

We are made acquainted with the objects sought to be achieved in the creation of the judicial powers and with the construction which can alone satisfy the full measure of their intent. To effect those ob-

jects the framers of the constitution used, as we claim, the most appropriate and comprehensive word to be found in our language.

The word CONTROVERSY is not found in the nomenclature of the law; and Webster's Dictionary, whose various authors have industriously gathered all the meanings, and shades of meaning of the words of our language, does not define controversy in any sense as a synonym or equivalent for law suit.

It is defined, and generally understood to mean, a dispute, contention, debate or wrangle, and when spoken of in reference to judicial proceedings, it remains the same dispute, though formulated into an issue to be tried and determined *in* some law suit. Any point of contention is a controversy, and all the controversies involved in a suit, make up the total of the issues to be tried.

The word SUIT, on the other hand, belongs peculiarly to the terminology of the law; and its existence presupposes some tribunal for its trial and points of contention involved between parties arrayed in the attitude of plaintiffs or defendants; and it is strictly and technically proper to define a suit as existing only and wholly between *its* plaintiffs and *its* defendants.

But a CONTROVERSY ordinarily exists between parties who bear no relationship to each other of plaintiffs or defendants, and exists, even though it is not in a situation to be judicially determined. When introduced into a judicial proceeding, it becomes an issue, but still remains simply a point of contention, and may exist variously between a part or all of the plaintiffs and defendants in the suit; or, in a proceeding in equity, wholly or partially between different defendants.

Referring now to the Act of Congress of March 3d, 1875, we find that, with a limitation as to value, and subject to specified provisions as to amount, the Circuit Courts of the United States are given a

jurisdiction co-extensive with that which Congress is authorized to confer upon them: the only exceptions being of "cases of admiralty and maritime juris-tion," and of "controversies in which the United States shall be a party" defendant; the jurisdiction in the excepted cases having been already delegated by Congress to other courts.

And it will be found that the language in which the judicial power has been delegated by Congress in the Act is in exact accord with the construction of the judicial powers we have contended for.

It is declared that the Circuit Courts shall have cognizance of cases originating therein, or removed thereto in compliance with the Act, "of all suits of "a civil nature at common law or equity * * * in "which there shall be a controversy between citizens "of different States, or a controversy between citi-"zens of the same State claiming lands under grants "of different States, or a controversy between citi-"zens of a State and foreign States, citizens or "subjects."

As the jurisdiction is imparted over suits "*in which* there shall be a controversy," it is clear that Congress understood that a controversy was not a suit, but some issue or matter of construction contained *within* a suit, and forming one of its ingredients. It is not declared that it shall be *the* controversy in the suit, or the whole issue involved, but it is sufficient if there is *a* (one or any) controversy involved between the designated classes of persons.

In authorizing a removal of cases from the State to the federal courts, the Act provides, that when, in any suit, "there shall be a controversy which is "wholly between citizens of different States, and "which can be fully determined as between them, "then either one or more of the plaintiffs or de-"fendants actually interested in such controversy, "may remove said suit to the Circuit Court of the "United States for the proper district."

Or as it is evident that all parties interested in the controversy must be arrayed among either the plaintiffs or the defendants in the suit, the provision is virtually a declaration that, when the contro-

versy is wholly between citizens of different States, any single person who is a party to, and interested in such controversy, may carry the suit with all its controversies and all its parties into the federal circuit courts.

But if, on the other hand, the suit does not involve some controversy, existing wholly between citizens of different States, the removal of the suit is less favored, and then it can only be removed at the instance of "either party."

Whether the "party" named is used in the sense of being either the plaintiffs or the defendants, or of being the persons who are on one side of some particular controversy, is not material to the present discussion. It is sufficient to say here, that Congress evidently intended to provide for the removal of two classes of controversies, the one existing *wholly* between citizens of different States, (and, of course, if so existing is capable of being "fully determined between them") and the other existing only *partially* between citizens of different States."

After the removal of the suit, the Act further requires the federal circuit court to dismiss or remand it, if it is found that such suit "does not really and substantially *involve a dispute* or controversy properly within" the jurisdiction of such Court.

These views of the intent and scope of the judicial power now under discussion, seem to be those entertained by a portion of the members of the Supreme Court in opinions rendered at various circuits.

Mr. Justice Bradley, in *Girardey* v. *Moore*, American Law Times, vol. iv., p. 387, says:

"As to the extent of the judicial power I never "had a doubt. My view is this, that whenever the "controversy in a suit is between citizens of dif- "ferent States it is within the judicial power of the "United States, though there are other persons in "the case, citizens of the same State, with a person "or persons on the opposite side to them. The "grant of judicial power is in the affirmative; it

"extends to controversies (and of course to all con-
"troversies) between citizens of different States.
"There is no negative, no exception of any cases
"in which the same controversy has also citizens
"of the same State on the two sides thereof. If
"the controversy involved is a controversy between
"citizens of different States it is within the term,
"and, I think, within the spirit of the power
"granted. The constitutional language cannot be
"satisfied without giving it this construction; to
"say that it only embraces those controversies in
"which all the parties on one side and all the
"parties on the other side are citizens of different
"States is to interpolate a limitation in the con-
"stitution which is not found there."

Mr. Justice Miller, in the case of *Board of County Commissioners of Arrapahoe County* v. *Kansas Pacific Railway Company et al.* (5 Central Law Journal, p. 102), gave his opinion that the judicial power, as delegated by the Act of March 3d, 1875, gave the circuit court jurisdiction where the sole controversy was *between different defendants*, even though citizens of the same State were on different sides of the suit. Thus, essentially holding the view contended for, that a controversy is not a suit, but a dispute or issue involved *in* a suit. That case is, as will be seen, one where the federal court would, under the restricted construction that has been contended for, have lost jurisdiction over a controversy which existed wholly between citizens of different States.

Mr. Justice Strong, in *Taylor* v. *Rockefeller* (7 Central Law Journal, p. 349), comments at length on the judicial power, and the jurisdiction conferred by the Act of 1875. His opinion announces three doctrines which form constituents of the rule of construction now contended for: 1st. That a controversy is not a suit, but one, it may be, of numerous subjects of controversy involved in a suit. 2d. That the particular subject matter of controversy in a suit existing between citizens of different States need not be the main controversy involved in the

suit, in order to confer jurisdiction. 3d. That, because of the particular controversy existing between citizens of different States, the jurisdiction attaches to all the other controversies and parties in the suit.

Mr. Justice Harlan, in *Ryan* v. *Young* (The Reporter, vol. 8, p. 229), remanded a case to the State Court, because the only real substantial controversy was between citizens of the same State; but intimated, if the controversy had existed in part between citizens of different States (as, he says, appeared to have been the case on the face of the original bill) that then the jurisdiction would have attached; thus impliedly asserting that a contention between citizens of different States over a portion of the interest involved in a controversy, warrants the exercise of the federal jurisdiction.

It will, undoubtedly, be argued that a jurisdiction as comprehensive as that which we have claimed to have been created by the constitutional grant, and developed by the Act of Congress of 1875, will result in drawing to the Federal Courts an inconvenient amount of litigation, a large portion of which might, in consonance with the ends of justice, be left, as it has been hitherto, to be determined by the State Courts.

But such an objection ought not to weigh, if it shall be found that the construction claimed, consists with the language of the constitutional grant and promotes its general intentions.

The framers of that instrument created a power which they intended to be, of a scope sufficient to be adapted to the future exigencies of the Union. At the same time they constituted the Legislative Department of the Government the sole judge as to when, and to what extent that power, or any portion of it, should be exercised.

The mere fact that Congress has, from time to time, under the authority of that power, enlarged the jurisdiction of the Federal Courts, ought to be

accepted by the Judicial Department as evidence that such enlargement has been made in deference to some need for a more efficient administration of justice.

And if the jurisdiction as now extended shall be found, in any of its phases, to be unnecessary or burdensome, it may fairly be presumed, that as it will, in such an event, be the duty of Congress, so it will be its inclination to remit back any such present, objectionable portions of the jurisdiction, among the undelegated judicial powers.

MELVILLE C. DAY.

Field

Oct. 29. 1879

Supreme Court of the United States.

Nos. 209, 210, and 500. October Term, 1879.

209. THE DELAWARE RAILROAD CONSTRUCTION COMPANY AND THE DELAWARE COUNTY RAILROAD COMPANY,
APPELLANTS,
v.
LEWIS H. MEYER AND WILLIAM DENNISON,
TRUSTEES.

210. THE DELAWARE RAILROAD CONSTRUCTION COMPANY
APPELLANT,
v.
LEWIS H. MEYER AND WILLIAM DENNISON,
TRUSTEES.

500. LEWIS H. MEYER AND WILLIAM DENNISON,
TRUSTEES, PLAINTIFFS IN ERROR,
v.
THE DELAWARE CONSTRUCTION COMPANY.

BRIEFS AND STATEMENT OF FACTS AGREED

IN THE CASE

JOHN W. McKIM,
Judge of Probate,
v.
GEORGE B. BLAKE ET AL.,
Executors,

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Supreme Court of the United States.

Nos. 209, 210, and 500. October Term, 1879.

209. THE DELAWARE RAILROAD CONSTRUCTION COMPANY AND THE DELAWARE COUNTY RAILROAD COMPANY,
APPELLANTS,
v.
LEWIS H. MEYER AND WILLIAM DENNISON,
TRUSTEES.

210. THE DELAWARE RAILROAD CONSTRUCTION COMPANY
APPELLANT,
v.
LEWIS H. MEYER AND WILLIAM DENNISON,
TRUSTEES.

500. LEWIS H. MEYER AND WILLIAM DENNISON,
TRUSTEES, PLAINTIFFS IN ERROR,
v.
THE DELAWARE CONSTRUCTION COMPANY.

BRIEFS AND STATEMENT OF FACTS AGREED

IN THE CASE

JOHN W. McKIM,
Judge of Probate,
v.
GEORGE B. BLAKE ET AL.,
Executors,

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

JOHN W. MCKIM, JUDGE OF PROBATE,

v.

GEORGE B. BLAKE ET AL., EXECUTORS.

BRIEF FOR PLAINTIFF ON MOTION TO REMAND TO THE STATE COURT.

This is a suit upon a probate bond given by a trustee under the will of a citizen of Massachusetts against the executors of the will of one of the sureties, who was also a citizen of Massachusetts. Two of the executors are citizens of Massachusetts, and the third is a citizen of New York. The plaintiff is the judge of the probate court, a citizen of Massachusetts, in whose name this action is brought for the benefit of the *cestuis que trust*, who are all of Massachusetts.

No question arises under the constitution, laws, or treaties of the United States, and the case is one which is especially suitable to be tried in the courts of the State of Massachusetts. The bond in suit was given, the trustee was appointed, and the trust was administered under the probate laws of this State; and the controversy must be determined in accordance with these laws, which can best be interpreted by the tribunals of the State.

The defendants' testator was of this State, and they are

acting as executors within its jurisdiction and under appointment of one of its probate courts. Their accounts are rendered and settled here, and all their doings are under the authority and subject to the control of this probate court.

It has been held by the courts of the United States that no action can be maintained against an executor or administrator unless he has been appointed to that office by the proper tribunals having jurisdiction in probate matters in the State or county where the suit is instituted.

3 Redfield on Wills, 272.
Vaughan v. *Northrup*, 15 Pet., 1.

The majority of the executors have the same citizenship as the plaintiff, and reside in the jurisdiction under which they derive their official authority, and the citizenship of the defendants, as executors, should be deemed to be that of the majority of the board. The third executor has no interest in the controversy which can be separated from that of the others, and his non-residence does not, in any sense, make the action a controversy between citizens of different States.

Several executors of one testator "are all considered in law in the light of an individual person."

Williams on Executors (7th ed.), 245, 946.

Can the citizenship of the board be held to be in New York, where only one of the three executors resides, in a jurisdiction in which the executors have no official existence or authority?

The executor who resides in New York is not a necessary party to the suit. In an action in a Massachusetts court against executors or administrators, if one lives in another State, and has not been served with process, the action may be prosecuted to judgment against those who have been served with process, as the judgment is against the estate of

the deceased person whom they represent, and not against themselves personally.

Tappan v. *Bruen*, 5 Mass., 196.

The interest of the defendants being joint and inseparable, and the major part of them being citizens of the same State with the plaintiff, the judicial power of the United States, under the Constitution, does not authorize its courts to take jurisdiction of the case. The substantial controversy is between citizens of the same State, and it is not, and cannot become, one of Federal cognizance.

Dillon on Removal of Causes (2d ed.), 29–31, and cases cited.

Bryant v. *Rich*, 106 Mass., 192.

Florence Sewing Machine Co. v. *Grover & Baker Sewing Machine Co.*, 110 Mass., 80.

The term "party," in Sect. 2 of the Act of 1875, Chap. 137, is collective, and means all the plaintiffs and all the defendants, and all on each side must be "citizens of different States" from those on the other side, in order that there may be a right of removal under any other than the last paragraph of this section.

SWAYNE, J. *in re Frazer's Estate*, 6 Rep., 357.

Petterson v. *Chapman*, 13 Blatch., 395.

Sawyer v. *Switzerland Marine Ins. Co.*, 14 Blatch., 451.

Van Brunt v. *Corbin*, 14 Blatch., 496.

JAMES C. DAVIS,
for the Plaintiff.

BRIEF ON BEHALF OF DEFENDANTS ON MOTION OF PLAINTIFF TO REMAND TO STATE COURT.

This action, which the defendants claim has been properly removed to this court, is brought to recover a large sum of money, some $50,000, upon a probate bond on which the defendants' testator was a surety. Upon the merits of the case, complicated questions of law and fact will arise, and the issue will be of great moment to the defendants.

The question raised by the plaintiff's motion is a most important one, not only to these defendants, but as involving the construction of a statute of the United States, and indirectly of a clause of the Constitution as well.

There is no dispute in regard to the facts upon which this motion is based, and it is admitted that the requisite forms and proceedings prescribed by the statute for removal have been seasonably complied with.

The fact that the defendants are executors of a Massachusetts estate does not affect the right of removal.

The *personal* citizenship of the parties determines the jurisdiction of the Circuit Court.

Amory v. *Amory*, 5 Otto, 186.
Coal Co. v. *Blatchford*, 11 Wall., 172.
Green's Admx. v. *Creighton*, 23 How., 90.
Childress v. *Emory*, 8 Wheat., 642.
Chappedelaine v. *Dechenaux*, 4 Cranch, 306.
Dodge v. *Perkins*, 4 Mason, 435.
Carter v. *Treadwell*, 3 Story, 25.
Geyer v. *Life Ins. Co.*, 50 N. H., 224.

That the State Court disallowed the petition for removal is wholly immaterial, as it is the duty of the Federal Court to take or refuse jurisdiction without regard to the decision of the State Court.

Taylor v. *Rockafeller*, 6 Reporter, 226, Strong, J., U. S. Cir. Ct., W. D. Penn.

Mr. Justice Strong says, "The Act declares that after the petition and bond are filed, the State Court shall proceed no farther. . . No order of the State Court was necessary for the removal. . . A decision, therefore, of the State Court . . . cannot force jurisdiction upon the Circuit Court, nor can it deny jurisdiction to it."

Also *Cobb* v. *Globe Mut. Life Ins. Co.*, 6 Reporter, 515; Hughes, J., U. S. Cir. Ct. E. D. Va.

The sole objection, then, of any weight raised to the removal of the action to this court is that *all* the defendants are not non-residents of Massachusetts.

It is admitted that prior to the statute of March 3, 1875, this action could not have been removed by the defendants from the State Court.

But we contend that the statute of 1875 authorizes such removal.

By Sect. 1 of this Act a broader jurisdiction is conferred upon the Circuit Courts than ever before. The language, so far as it affects the question at issue, is as broad as that of the Constitution; indeed, the precise words are used.

Jurisdiction is conferred of all suits at law or in equity, involving more than $500, "in which there shall be a controversy between citizens of different States."

Sect. 2 provides for the removal of any such suit (using

the same language) from any State Court to the Circuit Court of the United States for the proper district.

The single question, then, is whether this court has *jurisdiction* of such an action, the language of Sect. 2, authorizing the removal, being identical with that of Sect. 1 conferring jurisdiction.

The Judiciary Act of 1789 (c. 20, §§ 11 and 12) conferred jurisdiction upon, and authorized removal to the Circuit Court, where the "suit is between a citizen of the State where the suit is brought, and a citizen of another State," and the Supreme Court held that this language required that each of the plaintiffs and defendants must be competent to sue and be sued in the Circuit Court; in other words, that each side must be a unit.

Strawbridge v. *Curtis*, 3 Cranch, 267.

This decision held good under all the later statutes prior to 1875, and was followed in the Sewing Machine cases under the Act of 1867.

But the Act of 1875 has removed the limitation imposed by the prior statutes.

Under the Constitution, then, is it necessary that each plaintiff shall be capable of suing each defendant in the Circuit Court, in order that jurisdiction be conferred?

Does the fact that a single one of several parties on one side is a resident of the same State with the opposite party, prevent the jurisdiction from attaching under the Constitution?

We submit that such could not have been the intent of its framers.

The purpose of this clause of the Constitution was to extend the jurisdiction of the Federal Courts to cases in which the State tribunals could not be supposed to be impartial or unbiassed.

Hamilton in *The Federalist*, No. 80.

The intent clearly was, that no person should be compellable to submit to the decision of the tribunals of a State other than that in which he had voluntarily chosen to reside.

With the framers of the Constitution the States were foreign to each other, and the source of all power; such powers were ceded, however, to the general government, in other words, there was such a degree of centralization, as seemed necessary for affording ample protection in all his rights to every citizen of the United States.

The object of the provision under discussion was clearly to secure to non-residents of the State where the suit is brought the right under the Constitution to an impartial trial; and ought they to be debarred of this right by the fact that some one is joined with them in interest who does not need the aid of the Federal Courts?

It matters not that in the case at bar only one defendant is a non-resident of Massachusetts, or that the court may be of opinion that the State Court can here administer impartial justice: of this the party concerned and not the court must be the sole judge.

This case is of great importance to the defendants, and if in their desire that the highest court of this country should pass upon questions of law involved, they urge here their constitutional right to a trial in the Federal Courts, we submit that the court will construe the language of the Constitution liberally in favor of this right, and not debar them by subtle reasoning and strict construction.

Judge Dillon in his pamphlet on the Removal of Causes,

p. 22, says: "The experience of the past should induce great caution in the courts in applying to that Act (1875) the rigid principles of the early adjudications on the subject of Federal jurisdiction."

The inference from the statute itself is strongly in favor of the jurisdiction.

The last clause of Sect. 2 is as follows: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district;' and Sect. 3 provides: —

"That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a State Court to the Circuit Court of the United States, he or they may make and file a petition in such suit in such State Court," etc.

It is clear that in a case like the one at bar, *all* the parties on one side must concur in the petition for removal.

There might be a hardship, as the framers of this statute perceived, in allowing one or more of several non-residents, against the will of their co-plaintiffs or co-defendants, to remove a suit, in which all are equally interested, to another court; it was therefore provided that such non-resident or non-residents, being a portion of one side, could do this only where there was a separate controversy which concerned themselves alone, and in which their co-plaintiffs or co-defendants had no interest.

Hence the provision of Sect. 3, that one or more of several plaintiffs or defendants having a separate controversy may petition *separately* for removal.

From this follows the clear inference, which it was unnecessary to state in more express terms, that where, as in the case at bar, there is no such separate controversy, the joinder of *all* the plaintiffs or defendants in the petition for removal is necessary, but upon such petition and proceeding by *all* of one side, *all or some of whom* are citizens of different States from the opposite party, the case is removable.

In the case at bar, *all* the defendants have so petitioned.

The statute itself thus recognizes the right of such removal.

While the Supreme Court of the United States has not yet decided the question here presented, it has arisen incidentally and been under discussion in the Circuit Courts.

In the case of *Taylor* v. *Rockafeller*, 6 Reporter, 226 (U. S. Cir. Ct., W. D. Penn.), cited above, decided by Mr. Justice Strong, the petitioners, being a portion of the defendants, were non-residents, and the other defendants and the plaintiffs were residents of the State where the action was brought. The petition was based on the ground of a controversy wholly between the plaintiffs and the petitioners, and although not the sole controversy in the case, the Circuit Court refused to remand, and entertained jurisdiction.

The Court says: "The petitioners are, therefore, citizens of a different State from the plaintiffs, though some of the plaintiffs and some of the defendants are citizens of the same State. Before the Act of 1875, the Circuit Court would have had no jurisdiction, because each of the plaintiffs was not capable of suing each of the defendants in a Federal Court.

But the Act of 1875 introduced great changes. *Under it any cause which might have been commenced in the Circuit Court may be removed to it.* Whether since the Act of 1875 the right of removal extends to all cases in which some of the necessary or indispensable defendants are citizens of the same State with the plaintiffs, or some of them, is undoubtedly a very important question not yet decided. It does not, if the rule applied to the Acts of 1789, 1866, and 1867 is applicable. But the later Act" (of 1875) "for the first time adopts the language of the Constitution, and seems to have intended to confer all the jurisdiction it was in the power of Congress to bestow.

Certainly the case mentioned would be a controversy between citizens of different States, and the reasons which induced the framers of the Constitution to give jurisdiction to the Federal Courts apply as strongly as where all the defendants are citizens of a State other than that of which the plaintiffs are citizens, and if the instrument is to be construed to carry out its intent, the question should be answered in the affirmative."

In *Lockhart* v. *Horn*, 1 Woods, C. C. R., 628, 634, decided under the Act of 1867, Mr. Justice Bradley said, "Were this an original question, I should say that the fact of a common State citizenship existing between the complainants and a part only of the defendants, provided the other defendants were citizens of the proper State, would *not* oust the court of jurisdiction.

"*It certainly would not under the Constitution. The case would still be a controversy between citizens of different States.* But the strict construction put by the courts upon the Judiciary Act is decisive against the jurisdiction, and I am bound by it."

In *Osgood* v. *Chicago, D. and V. R. R. Co.*, 6 Bissell, 330, 337 (U. S. Cir. Ct., N. D. Ill.), Judge Drummond says that the first clause of Sect. 2 refers to a removal "by the whole of what constitutes the one side or the other. The second clause states when a case can be removed by either parties less than the whole."

He also says, "As this is a case where there are several defendants, *some of whom have not joined in the petition for removal*, the question is whether there is a controversy wholly between the plaintiff and those who have petitioned for a removal."

In *Tyler* v. *Hagerty*, 5 Reporter, 300 (U. S. Cir. Ct., N. D. Ohio, Welker J.), the court merely held that under the last clause of Sect. 2 of the Act of 1875, one of the defendants could not petition to remove the suit unless the controversy were wholly between him and the plaintiffs.

Which precisely accords with our argument.

So *Carraher* v. *Brennan*, 7 Biss. 497. (U. S. Cir. Ct., N. D. Ill., Blodgett J.)

In *Ex p. Grimball*, 7 Rep. 362 (Sup. Ct., Ala.), one of several defendants petitioned for the removal of the case to the United States Court; all the parties, except the petitioner (who was a resident of New York), were residents of Alabama.

The suit was held not removable, on the ground that Grimball was not a necessary party, and that *none of the other parties* joined Grimball in his petition.

The Court said, "There is not in it a controversy which is wholly between citizens of different States and which can be fully determined between them, and it is not therefore such a suit as under the Act of 1875 can be removed *upon the petition of one of the several defendants.*"

In *Re Fraser's Estate*, 6 Reporter, 357 (U. S. Cir. Ct., E. D. Mich., Swayne J.), only the non-residents joined in the petition for removal, and although Judge Swayne held that the word "party" in the Act of 1875 is collective, he expressly says, "I feel constrained" so to hold, "in the light of the past adjudications and in the absence of any expression from the Supreme Court, (whatever might be my judgment under the circumstances.)"

There are decisions and dicta of some of the circuit judges opposed to the view taken by the defendants here, but they are in general based upon the decisions under the Judiciary Act, and simply evidence a reluctance to take a new departure until light shall have been shed upon the subject by the Supreme Court sitting *in banc.*

There is a remark of Waite C. J. in *Ober v. Gallagher*, 3 Otto, 199, which does not accord with the view taken by the defendants.

But in the later case of *Gold-Washing & Water Co.* v. *Keyes*, 6 Otto, 204, he says, "The Act of 1875 has made some radical changes in the law regulating removals. Important questions of practice are likely to arise under it;" and he is careful to decide only the precise question involved.

In *Board of Commissioners of Arapahoe County* v. *Kansas Pacific Railway Co.*, 4 Dillon, 277 (U. S. Cir. Ct., Dist. Col.), Mr. Justice Miller relies wholly on the interpretation of the Judiciary Act in Cohens *v.* Virginia, 6 Wheat., 264, and does not discuss the question from the standpoint of the Constitution.

Petterson v. Chapman, 13 Blatchford, 395, U. S. Circuit Court, N. D., N. Y., decided by Judge Johnson, is unfavorable to the defendants.

In the recent case of *Tremain* v. *Amory*, U. S. Circuit Court, Mass. Dist., Judge Lowell discusses the meaning of the word "controversy" in the Constitution, and holding it synonymous with "suit" in the Judiciary Act, considers himself on that ground alone bound by the prior decisions, while regretting, apparently, the narrow construction which had been given to that Act.

It is needless to say that this technical reasoning avoids the broad question at issue. We have not based our argument upon any particular meaning of the word "controversy": the question is, placing the broad language of the Constitution "controversies between citizens of different States," in contrast with the language of the Judiciary Act, "suits" (or controversies if you please) "between a citizen of the State where the suit is brought, and a citizen of another State," whether the former is susceptible of the narrow construction given to the latter.

Under the Act of 1875 it is clear that neither party need be a citizen of the State where the suit is brought. But if this were the sole distinction, why should not the statute of 1875 have read "suits" (or controversies, perhaps) "between a citizen of one State and a citizen of another State"?

Each side should then clearly have been a unit under the interpretation applied to the Judiciary Act.

Is there no difference, then, between this language and the expression "controversies between citizens of different States," as used in the Constitution?

We respectfully submit that this Court, no longer trammelled by the narrow interpretation of the Judiciary Act, and free to construe the language of the Constitution in accordance with the broad intent of its framers, will hold in favor of the right of removal.

We have cited substantially all the cases bearing upon the point that have come to our notice, and we submit that in the absence of any binding decision, the weight of reason, which we confidently believe to be strongly in favor of the defendants, should govern the decision of this Court; and for authority the clear and decided expressions of opinion of Judges Strong and Bradley, above quoted, are entitled to great weight and respect.

BROOKS, BALL & STOREY,

Attorneys, and of Counsel for Defendants.

AGREED STATEMENT OF FACTS ON MOTION OF PLAINTIFF TO REMAND TO STATE COURT.

This is a motion to remand the above entitled case from the Circuit Court of the United States, for the District of Massachusetts, to the Supreme Judicial Court for the County of Suffolk and Commonwealth of Massachusetts.

The facts are agreed to be as follows: —

The above entitled case is an action of contract in which John W. McKim, Judge of the Probate Court in and for said County of Suffolk, is plaintiff, and George Baty Blake, of Boston, in said County of Suffolk, Arthur W. Blake, of Brookline, in the County of Norfolk, in said Commonwealth, and Joseph E. Brown, of the City, County and State of New York, executors of the will of George Baty Blake, late of Brookline, in the County of Norfolk, in said Commonwealth, deceased, are defendants, brought to recover the sum of fifty thousand dollars upon a probate bond upon which the defendants' said testator was a surety, said bond having been given by a trustee under the will of Henry Todd, late of said Boston, deceased, with condition for the faithful performance of his duties as such trustee, and the declaration alleges breaches of the said bond.

In said suit the writ was dated Nov. 15, 1877, and was returnable to, and duly entered at, the April term, 1878, of said Supreme Judicial Court.

Said defendants appeared and filed their answer in said case and at said April term, 1878, of said Supreme Judicial Court, being before the term at which said cause could be first tried; and before the trial thereof, said defendants made and filed their petition in said suit in said Supreme Judicial Court, for the removal of said suit into the said Circuit Court of the United States to be held in the District of Mas-

sachusetts, alleging that said Joseph E. Brown, one of said defendants, was, when said suit was commenced, and still is, a citizen of the State of New York; and that John W. McKim, the plaintiff in said suit, and Mary C. Washburn, Julia Todd, Henry T. Washburn and Frank I. Washburn, the parties at whose request and for whose benefit said suit was brought, were, when said suit was commenced, and still are, citizens of the Commonwealth of Massachusetts, and alleging that the matter in dispute in said suit exceeds, exclusive of costs, the sum and value of $500; and said defendants made and filed therewith a bond with good and sufficient surety, conditioned as provided in Sect. 3 of Chap. 137 of the Statutes at Large of the United States, of the year 1875, being the Act of March 3, 1875. The plaintiff objected to said removal; and upon hearing said petition, the said State Court held that said suit did not come within the provisions of said Act of March 3, 1875, and declined to allow said removal. Exceptions were taken to said ruling, and filed, and the same are still pending, not having been argued.

The defendants thereupon, in accordance with the provisions of said Act of March 3, 1875, filed in said Circuit Court a copy of the record in said suit, and duly entered the same at said October term, 1878, of said Circuit Court, and claim to have removed the said suit to said Circuit Court.

At the time when said suit was brought, the nominal and real plaintiffs were and still are citizens of the State of Massachusetts; said George Baty Blake and Arthur W. Blake, two of said defendants, were and still are citizens of said Massachusetts, and said Joseph E. Brown, the other of said defendants, was and still is a citizen of the State of New York. The plaintiff, on October 17, 1878, filed in said Circuit Court his said motion to remand said suit to the State Court, alleging that the said George Baty Blake and Arthur

W. Blake were and are citizens of Massachusetts as aforesaid, and that the said suit does not involve a dispute or controversy properly within the jurisdiction of this Court, and that the defendants were not entitled to remove the same to the Circuit Court.

No objection is made to the form of said petition for removal, or of said bond, and it is admitted that the said copy of said record was seasonably filed and entered in said Circuit Court.

JAMES C. DAVIS,
for the Plaintiff.

BENJ. L. M. TOWER,
for the Defendants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1879.

The Delaware R. R. Construction Co. and Delaware County R. R. Company, *Appellants,* *vs.* Lewis H. Meyer and William Dennison, Trustees, *Appellees.*	*Appeal from the United States Circuit Court for the District of Iowa.* 209—now 29.
The Delaware R. R. Construction Company, *Appellant,* *vs.* Lewis H. Meyer and William Dennison, Trustees, *Appellees.*	*Appeal from the United States Circuit Court for the District of Iowa.* 210—now 30.
Lewis H. Meyer and William Dennison, Trustees, *Plaintiffs in Error,* *vs.* The Delaware R. R. Construction Company.	*In Error to Supreme Court of Iowa.* 500—now 260.

P. C. KENYON, Legal Printer, Des Moines, Iowa.

statement of counsel on the other side will be found to correct our errors and aid this court in understanding the case, we shall leave you to determine after your honors shall have consulted its pre-eminently connected, condensed, correct, and lucid pages! If they are content with their running, disconnected, disjointed statement (made under a high sense of duty!), we are with ours. And here we leave their criticism in this respect, with perhaps an occasional reference as we proceed to their statements and claims based thereon.

Let us then turn to their argument, and here:

THE JURISDICTIONAL QUESTION.

First. It is attempted to meet our objection that their petition for removal *was not signed*, by a reference to the English practice in equity cases. And counsel refer to 2 Dan. Ch. Practice, where it is said that a "petition except for rehearing or appeal is *not* signed by counsel." And our friend Judge Grant underscores the word "*not*." If he had gone three words forward, and made his *dash* under "counsel" he would, as your honors well know, have got nearer the meaning of the author and the good sense of the rule and practice. This is plain enough from the words which follow those quoted, as follows: "Nor need it be *prepared by one*." For our friend, who argues that because a petition is not to be *signed* by counsel, it is therefore not to be signed by any one, would of course argue with equal logic; that as it need not be *prepared by counsel* therefore it *need not be prepared at all!!* In "rehearing and appeal cases" under the English practice, counsel were required to sign the petition because *they* were to certify or state that in *their judgment* there was reasonable cause, &c., just as under our practice, they must state that a "demurrer in their judgment is well taken." No other person could do this. But *non constat*, that every other petition would be good without signature. And yet that is what counsel would have you understand from the quotation made.

It is suggested by our friend that all those lawyers in Iowa "*who had wisdom enough to get over the prairie practice*" know that courts have followed the common law decisions, holding that a paper is signed by the party offering it if his name appears in it, whether at the *top, bottom or middle ! !* And after citing *Wise vs. Ray* (3 G. Greene, 430), he adds, in a tone doubtless intended to be severe, "upon those who had not wisdom enough to get over prairie practice, that this is the first time that ancient decision of the Iowa Supreme Court had been questioned." [He might have added that it is the first time that the case was ever invoked, in a case like this]. For counsel either forgot or overlooked two or three things just here. In the case referred to it was "assumed and not denied that the defendant's name (Ray), which appeared in the body of the instrument, was proved to be *in his own handwriting.*" Is there anything of that kind here ? Then, too, if the circuit court of Iowa had granted the petition for removal, the court below and this court might have presumed that like proof was made in this case, and this because of the presumption obtaining in favor of such decision. But, as it did not so hold the presumption, still being in favor of the holding, must be that no such fact was shown and especially so when there is nothing in the record to show that the names were written by or in the handwriting of the petitioners or by any person for them, nor by whom written.

So again, to make this method of signing good it should appear that it is made with the design of completing the instrument and without contemplating any further signature.

And equally important is it to remember that the names of Dennison and Meyer *both* appear in the body of the instrument, whereas Meyer was *not then a party to the record.* And as he had no right to pray a removal, will the insertion of the two names in the body of the so-called petition, be equivalent to a *signature* by the only one who was so in court as to invoke its action ? They make a joint prayer and ask removal

as to both. Suppose the petition had been signed by Dennison alone, and had been granted as to him, but denied as to Meyer, would the doctrine of the "ancient decision in Iowa" even when there was "wisdom enough to get over prairie practice" warrant interference with such order as to the intermeddler Meyer?

We have in our opening argument called attention to the fact that there is nothing to show who wrote the so-called petition—who inserted these names—nor even who filed it with the clerk. It therefore does not come within the rule referred to, any more than a writing having the name of A. B. in the body of it, promising to pay money, but not signed—without evidence that A. B. wrote or authorized it to be written, would be his promissory note. If he had *written the note* and said "I, A. B., promise to pay C. D." &c., we grant that it would, if delivered, be as good as if signed at the close. But until just such proof, or that which in law would be equivalent, the paper proves nothing and binds no one. And so it is of this paper. Upon the record as it stands it was entirely ineffectual to arrest the jurisdiction of the court, it was no more than a blank, and as the (Iowa) trial courts so held it, there could be no interferance with the decision.

And then conceding that when one puts his name in a *contract*, he would be bound thereby without further signing the same, we deny that such rule has application to a petition in court; certainly not unless written by himself or presented in person in open court. These papers are drawn by clerks or attorneys frequently on their own motion without knowledge of their clients, and they are expected to sign, or at least to do something to complete the same. And this suggestion has great force in this case, where your honors will see that they insert in the petition the "local predjudice clause," (and as we say the only cause stated) which needed verification, but which was never verified. Thus you have the most indubitable evidence that this was not intended to be a completed instru-

ment—that it was handed to the clerk by some one without authority and was therefore not treated by the petitioners themselves as a petition until after the trial commenced, they found that their case was hopeless, and they must resort to something to save themselves from shipwreck.

But it is said that this petition is not "technically a *pleading*" and that the court may at any time, in furtherance of justice, permit a party to amend, referring to section 2698 of the Iowa Code. We do not care whether this was technically a pleading or not. For the Iowa statute requires that the clerk shall make in what is called the "appearance docket" a memorandum "of the date of filing of all petititions, demurrers * * or *paper of any kind* and that no pleading of any *description* shall be considered as filed until said memorandum is made" (Code, section 200). When filed and the memorandum thus made, it is equivalent to filing in open court (section 2643). And as this was, at least, "a paper of some kind," it had to be filed and a memorandum made thereof, as of any other pleading, whether petition, answer, demurrer or motion. And, too, since there is no evidence in this record that the filing of this paper was ever noted in the appearance docket, neither the opposite party nor the court were bound to take notice of it. And it may have been for this very reason (this want of signature), that the clerk failed to so note it, and by reason of such failure that the Iowa court refused to treat it as a paper in the case. How that proposition can be answered is more than we can imagine.

Then as to the suggestion that they had a *right to amend*, there are at least three answers. 1st. The right to amend rests with the court and the discretion exercised will not be interfered with unless it was manifestly and clearly abused. Upon this subject there is an unbroken line of decisions in the Iowa courts. (We refer to *Brockman vs. Berryhill*, 16 Iowa, 103; *Floyd vs. The Mayor*, 18 id. 388). Neither the circuit court of the U. S. for Iowa, nor this court could or will undertake to

review the discretion exercised in this case, if the amendment was refused. If allowed the same rule would obtain.

But in the second place the application to amend was made *after the trial* had commenced and we defy counsel to find any case where *another tribunal* has interfered with the discretion exercised by the court in such a case and under such circumstances in *refusing the amendment.* If granted, there might not be interferance; but, if refused, the order is just as conclusive. That we are right as to the time this leave was asked will not be disputed. (But see transcript, case 30, folio 201 and 381; case 260, folio 108 and 190.)

A third answer is that *Dennison alone* asked to amend, Meyer never did (amended decree, case 30, folio 381). How can Meyer or these parties jointly now complain of this refusal.

But finally upon this point we insist that this court is not to inquire whether the amendment was properly or improperly refused, but the inquiry is, had the petitioners so complied with the law as to arrest the jurisdiction of the local court. If there had been no pretense of compliance before the trial was commenced you would not interfere, however much you might believe the court ought to have permitted a proposed application. No more will you if the law was not complied with, though you conclude that the amendment ought to have been allowed. This court has no jurisdiction nor had the federal court in Iowa, to determine any such question or pass in judgment upon the exercise of such discretion. Both this court, and that from which these appeals came, must take the case as it stood *at the time the trial commenced* and not as it would or might have been if the amendment had been allowed, nor as it stood after it got into the circuit court. Whatever took place afterwards cannot affect the jurisdictional question nor the right of these parties to remove the case as it stood when the removal was asked. If they had no right then, or before the trial commenced, that is an end of this question.

But counsel say (p. 23) that the petition is in the very language of the act of March 3, 1875. Granted, and what is gained. Any person could copy the language of the act and yet not have a petition entitling them to a removal. He can state that "he has reason to believe and does believe that from prejudice" * * "he will not be able to secure justice, &c.," following the very language of the statute, and yet that does not entitle him to a removal unless he signs and swears to it. So he may write himself or have some one write for him that he is a citizen of New York and the other party of Iowa, with all the requisites found in the statute, and yet if he fails to sign the petition "by himself or counsel," or so file it as to make it a part of the record, or shall so act as to waive it, the copying of the language of the act whether for his own amusement or to get ready for an emergency can avail him nothing. The difficulty with our friend is, that because he found a paper in a case in an incomplete state which follows the language of the statute he therefore concludes that it was good and that the state court could proceed no further. He might as well argue then *because the statute allows a removal*, therefore this was a good petition. The right to remove in a particular case depends upon a *compliance* with the law and not upon the law itself nor upon the ability of the party or his counsel to copy it. It depends too upon the compliance of the law in every particular (*Burdick vs. Hale*, 7 Biss., 96). [In this case there was a *blank* in the bond and the application was held insufficient.]

In this connection counsel insist that Meyer had a right to make himself an intervening defendant, and he cites Code of Iowa (section 2683) found in the apendix to his argument. To entitle him to intervene, however, it was necessary that he should have "an interest in the matter in litigation," for this is the language of the Code in the section quoted. Without this interest he had no right, and whether he had or not it was for the state court alone to determine, and this

your honors cannot and will not review. It is sufficient that he was not a party, that his petition for intervention was refused, and this ruling of the Iowa court is conclusive. It had jurisdictional power to determine that question, and when decided, until reversed or set aside, its decision binds all courts. That this right to intervene is purely statutory, and must be exercised at the time, and in the manner the statute prescribes, (See *Lee vs. Elevator Co.*, 42 Iowa, 33). It makes no difference therefore whether Meyer had or had not a right to intervene. He was not allowed to; was therefore not a party to the record, and hence had no right to join in a petition to remove. He had no further or other right than if he had never sought to intervene.

Second. What was the effect of Dennison's *application to continue* after filing the so-called petition? The facts are these: May 19, 1875, the so-called petition was marked filed, and the next day the bond (30, folio 169, 171). On the day last named Dennison's application for continuance was filed, as also his amended answer, which was struck from the files and the continuance refused. Thereupon another amended answer was filed by Dennison, which was again amended on the 21st, the trial following on the 22d, on which date Dennison again amended his answer (See statement of case page 5).

Counsel after referring to cases cited by us on this point (p. 11), says, that the question raised has been decided *ex cathedra*, in *Gordon vs. Longest*, (16 Pet. 97). We agree to everything ruled on that case on this subject. There, however, the application was made in *proper form* and no objections were made to the facts upon which it was founded. In such case this court held that the state court had no discretion to withhold the right to remove. But before that case can be of any value to our friend, you must find that this application was "in proper form," the very thing denied by us. And what that case has to do with the effect of their application to continue and subsequent answers, as a waiver of what they had

asked by their so-called petition is just what we do not very readily see. And so it is of *Ins. Co vs. Dunn*, (19 Wall.) cited by counsel. That case is very familiar to this court and we certainly need not recapitulate its facts to show how utterly foreign it is to the point we are now considering. There the "*conditions prescribed were complied with by the petition*," and the state court could proceed no further. Our point is that inasmuch as their so-called petition was not noted as filed in the proper appearance docket, as it was neither signed nor sworn to, nor called to the attention of the court until after the trial commenced, the petitioner, Dennison, (the only party defendant who could ask a removal), by applying afterwards for a continuance and twice answering, waived any right based upon this incomplete paper, and that he is not now in a position to insist that the court was without power to proceed further, merely because such paper had been handed to the clerk. In the Dunn case, the case had been removed, was pending in the federal court and the applicant protesting against the right of the state court to still try it, lost none of his rights. The state court had lost all rightful or jurisdictional control over the case. And yet counsel say that in that case this question is decided *ex cathedra*. (We shall have occasion to refer to this case again.)

We have no quarrel with *Osgood vs. C., D. V. R. R. Co.*, 2 Central L. J., 275, or the article in Southern Law Review 313, 315, (cited by counsel, p. 26), for they only lay down the rule that if the petitioner brings himself "within the terms of the law," or files a "proper petition" and "offers good security or bond," the state court is to proceed no further. Our friend might have saved himself all this trouble by first satisfying this court that he had a *proper petition* and offered good security. Then this case and others cited by him under this head might have some application. Until he does this he begs the whole question, and fills his brief with cases which have nothing to do with the one at bar. We cannot

forbear to remark, however, that when counsel intimates (page 27) that the Iowa court has not "heretofore been loyal in its duty to the constitution in this respect," he accuses without warrant, and assails the reputation of tribunals as loyal to the fundamental law and its every mandate as any in the land. Our friend seems to have an idea that whenever in any of his very many cases he wants to transfer to the federal court, all that is necessary is for him to make his wish known in his ever mild and dulcet tone, and if the state court does not then stop at once, if it proceeds a step further, it is disloyal to the constitution, to its duty, to him and should be at once arraigned for insubordination. He is alone, as we know, in his strictures, and our regret is that he should have deemed it necessary to excuse the failure of his clients or himself by this unprovoked slur upon good courts and good judges.

Whether this failure to comply with the law was the fault of himself or his clients, or both, or neither, we confess some difficulty in determining. For he says (p. 27) that "if appellant's (petitioner's) attorney had been in court it might have been *polite* for him to call the attention of the court to the petition." It seems that Dennison was not there, for Fisher, one of his attorneys, stated in his affidavit for a continuance (case 30, folio 175) that his client (Dennison) was then in the city of Washington, and he could not communicate with him in less than a week. Nor was Meyer there. If counsel was also absent, what could the court do but try the case? But this *polite* idea is ingenious rather than ingenuous, for the record shows that counsel were there, filing answers, arguing motions, asking continuance, and that when the case proceeded to trial the defendants *appeared* by their attorneys, Grant & Smith and L. M. Fisher. They were there all the time and in court.

It is denied by counsel (p. 27) that Dennison filed an answer *after* handing to the clerk the petition for removal, it being insisted that the filing of the answer, the petition of

Meyer to become a part, and petition to remove were all contemporaneous acts. If that is so, the claim of waiver, based thereon, is not well taken. But by consulting the records you will find that on the 19th of May, 1875, leave was given to file amended answer, and it was accordingly filed. On that day, too, the petition to remove was filed, and Meyer asked to intervene. On the next day Dennison moved to continue—filed another amended answer, which was again amended on the 21st (case 29, folios 567, 569, 571, 575). If counsel can break the force of that record by simply saying that our claim is *not true*, then it is idle to appeal to it.

But, counsel says, suppose after judgment had been entered by default the attention of the court was called to a plea filed before the hearing commenced, would it be any answer for the court to say "It is too late; the judgment is passed?" We answer yes, at the discretion of the court, unless defendant could and did show a meritorious defense, not on paper, but in fact. (42 Iowa, 542, 608; 43 id., 398.) And this must be so in the reason of things, unless technicalities are of more value than substance, and unless courts of justice are to be influenced by quibbles rather than by a desire to get at the real merits and settle controversies accordingly.

But counsel relies on *Yulee vs. Vose*, decided at the last term of this court, and says that *settles* the question as to the duty of the applicant to call the attention of the court to his petition for removal.

Our friend is so familiar with the federal decisions that we confess when we read this confident reference (before we had seen the case, decided as it was after the preparation of our opening argument), we concluded that all chance for discussion upon this point was at an end. What was our surprise, then, to find that the case, instead of sustaining him, has very much to support our theory of the law. For there, your honors will remember that the petition and bond were correct in form and in all other respects fully met the requirements of

the statute, and that *notice of the intended application to remove, based upon these papers, was served upon the other party almost two months before the trial.* The case was called for trial, a jury was sworn, when counsel for appellant called attention to the proceedings for removal and moved to dismiss the complaint. This motion was overruled and the trial proceeded, resulting in a verdict against defendant and appellant. In this court the motion to dismiss was treated as asking the court to proceed no further; and the question, so far as now material, was, whether the application was made in time. It was held that it was not too late, that the trial had *not commenced*, that the most that could be said was that *preparations were being made* for a trial. In other words, the application was treated as made *before* the trial or final hearing within the meaning of the act of July 27, 1866. Note now the difference between that case and this: 1. There, the other party had notice nearly two months before the case was called for trial of their intended application. We had no such notice at any time before trial. 2. No objection was made to the bond nor to any paper filed for the removal, but everything was done to meet the requirements of the statute. Here, then, was a most signal failure in many respects, as we have pointed out in our opening argument. 3. There, the trial had not commenced; preparations only were being made for it. Here it had not only commenced, but got so far beyond mere preparations that the testimony was being introduced. And hence this court must hold that to *commence* a trial is *not* to commence it in order to make that case of any value to the other side. And as this court there held "that the state court was not bound to surrender its jurisdiction until a case had been made, which upon its face gave Yulee, the applicant, the right to the transfer," or removal, it follows, as it seems to us, beyond all controversy, that these parties were not entitled to removal, and that the federal court erred in taking jurisdiction. If there is no stronger case than

that against us, we will not doubt the result. In this connection, however, see *St. Anthony Falls Co. vs. King, &c.*, 23 Minn., 186.

Third. It is said (p. 28) that the joinder of Meyer, though not a party, if "useless," could not vitiate or waive the "useful" petition of Dennison. The fallacy of this proposition as applied to an application of this kind, we attempted to show, and think we have shown, in our first argument, and do not care to pursue it further. And especially so, in view of their next proposition, as to the number of causes for removal stated in the petition, to which we now come.

Fourth. They say there were two causes for removal, "*difference in citizenship*" and "*local prejudice.*" It is admitted, of course, and could not be denied, that while the application, based upon the *first* ground, need not be sworn to, it must be verified as required by the act of 1867, if based upon the *second.* This application was *not* verified, and therefore as the state court was not bound to surrender its jurisdiction until a case was made which, upon its face entitled them to a removal, there can remain no question upon this point. We had as strong a right to have the case retained as they had to remove it, and if they were not strictly entitled to the removal, the jurisdiction of the state court should be maintained (12 John, 153). The ground of "*local prejudice*" then is out of the case. And they cannot shield themselves under the suggestion (p. 29) that we did not *object* that their petition was not verified. For this is a jurisdictional inquiry. We were not bound to file or specify our objections, but to object generally to the removal was sufficient. And if these parties had not brought themselves within the law *for any reason*, the refusal to remove was right. And let us right here say that you must take the record as it stood at the time the removal was asked; the case as then made, and not as it may have been made afterward. This court has nothing to do with what we did or did not do, or what they may have done *after*

the case got into the federal court. You might as well insist that if the requisite citizenship did not exist at the time removal was asked, yet if it did after the case was removed, the jurisdiction of the state court would thereby be ousted. And yet we need not say that this is not the law. *(Rawle vs. Phelps*, Vol. 8 of The Reporter, a very recent case in the United States circuit court of Michigan; also, *Roberts vs. Nelson*, Bl. C. C. Rep., 74). And hence all that is said by our friend about what was done after the case got into the federal court, by either party, whether in one of these cases or in the other, may be passed over, for certainly an imperfect and incomplete application for removal could not be there patched up and made good.

But it is insisted that there were *two* causes stated for removal, one of which it is admitted, or at least cannot be denied, required verification, and as this was wanting, the petition was thus far not what the law required. If the court (either state or federal), upon this ground or for this cause, ordered and sustained the removal, that was manifest error. Then was there any other cause? We say not. What precedes the local prejudice clause of the petition was necessary in order to remove upon that ground, and without this the petition would have been bad even if verified. Look at the petition, and your honors will see that there is no *division* or *numbering* of the causes, that there is but one statement, and that if it was intended to rely upon differences in citizenship, there was no earthly necessity or occasion for stating the other also. For their right to removal, if the right existed at all, was just as complete and as clearly given by the statute for the one ("citizenship") as for the other ("prejudice"). Good pleaders (and our friend, we freely admit, is our Chitty in such matters) are not thus liberal in the statement of causes. He knew, if his present theory is correct, that he had one good cause, and that it was useless to state another. And as we said in opening, if it was intended to rely on "difference

in citizenship," then to follow with the other unverified statement was not only most ungracious, but, if possible, even more, unnecessary. The truth is, this is an afterthought, and certainly this court will not, upon a petition so blind, indefinite and uncertain as to the ground upon which the transfer was asked, the substantial if not the only ground most clearly defective for want of verification—we say this court will not hold that it had the effect of stopping all further proceedings, nor that these parties had ground for complaint when the prayer for removal was denied.

Fifth. What counsel say (p. 29) in answer to our proposition that the railroad company was a necessary party because a mortgagor, we have already somewhat anticipated. They say we have answered this *by the record*, having had the case heard, upon our lien claim and cross-bill, that we thus voluntarily gave the federal court jurisdiction. We suppose it to be true in law and logic, that if trying a case in the state court after a proper case for removal had been denied will not be treated as waiver of any right for such removal, then it is equally true that if a case was not properly removed, to appear and plead in the federal court, certainly, after motions to remand and dismiss would no more patch up or give jurisdiction. If in the one case jurisdiction is at an end, and consent or appearance cannot confer it, neither can it in the other. Whatever we or either party may have done, therefore, after the case was in the federal court (as was suggested under the last head) cannot in the least effect our rights. We hence need hardly add that whether we did or did not omit the railroad company from our cross-bill, by no means concludes the question of the right of petitioners to remove a *branch* of a suit instead of the *suit* itself. And this is what they were bound and only had a right to do. There is no denying the facts as shown by the record that the railroad company was the mortgagor, that the trustee, Dennison, and the Delaware Railway Construction Company were claiming priority of liens against the property

of the railroad so mortgaged, that the railroad company was a citizen of Iowa (and, as we insist, a necessary party to this controversy as between these lienholders), and that it was not made a party to the removal proceedings. What we insist upon, therefore, is, that as this controversy or suit could not be determined between the lienholders without joining the mortgagor or common debtor, the attempt to remove was as to a branch, or part of the case, and not of the whole suit, which cannot be done. And hence, further, that as the railroad company was a co-defendant with Dennison, and a necessary party, and had a residence in Iowa, and the controversy could not be settled without bringing it in, Dennison, as a co-defendant, had no right to remove under the act of 1875, or any other. The controversy was not wholly between citizens of different states, and could not be finally settled as between the trustee and the plaintiff. The plaintiff and one of the necessary defendants were citizens of Iowa, each necessary to the settlement of the controversy or suit, and Dennison, a co-defendant, could not therefore object to the jurisdiction of the state court. (*Hudland Coal Co. vs. Brennan*, 7 Biss., 497; *Henry vs. Ill. Co.*, id., 103; *Hatch vs. C. R. I. Co.*, 6 Bl. C. C. R., 105.)

We were not present when the order was made for the reargument of these cases. Very recently, however, and without being positively advised, we have been led to believe that this is the point to which it was desired counsel should more particularly direct their attention. In view of the space already occupied, and what we must say upon the merits of the case, and the little time remaining before the case will be reached for rehearing, we regret that we cannot enter upon this discussion more at length. We presented our views, however, somewhat in opening. We have, too, before us two arguments, very full and able, devoted to this question alone, prepared by counsel interested in the same question in other cases (Nos. 236 and 870), which they had leave to file herein,

and we have therefore the less regret in being compelled to pass the question without the attention it would under other circumstances have received. We could do no better than in different language, certainly not any more clearly, present the grounds upon which the jurisdiction is denied. This would lead to an unnecessary trespass upon your time, which, whether successful or not, we always seek to avoid. How this can be distinguished from the sewing machine cases (18 Wall, 553), in view of the language of the two acts (1867 and 1875), so entirely alike as the two acts are, we cannot understand. But for reasons above given, we will not pursue the discussion.

Sixth. In answer to our objection (brief p. 12), that Dennison, by his appeal to the Supreme Court of the state from the order refusing the removal, waived his right to be heard in the federal court, and to take his transcript there and have the case heard, counsel (p. 32) say this is a "technical quibble to get the case out of the federal court," and asks "why do appellants come here if this is not a controversy with them." And in the same manner they undertake to dispose of the eleventh and twelfth points, found in our brief (p. 12).

Now it might not have been as easy to attempt an *answer* to our proposition as to thus curtly dispose of it, but we innocently imagine it might be more satisfactory. But perhaps not. What we attempted to maintain, was, that as the State Supreme Court, by *the act of the petitioners for removal themselves* in appealing to that court, first got possession of the case over which it had undoubted jurisdiction, *they thereby excluded the jurisdiction of* the federal court and could not after that and while the case was pending in the appellate court of the state, pursue their remedy in the federal court. And this very principle will be found stated in the Dunn case (19 Wall., 223). We endeavored to show in opening, the injurious consequences almost necessarily following this conflict of jurisdiction between federal and state courts, if this trustee and ap-

plicant for removal should be allowed to pursue both remedies, and that he must as a consequence be held to one and that first selected. The controversy could not proceed in two jurisdictions at the same time, and as the first levy upon property, whether made under federal or state authority, withdraws the property from the reach of the process of the other, [*Haga vs. Lucas*, Pet., 400], so the court first obtaining jurisdiction, takes, and must keep it, to the exclusion of the other. And with not a little confidence, we defy our friend to furnish a case where the applicant has been allowed to appeal to the highest court of the state from an order refusing his petition to remove, press his appeal and while so seeking to be heard, and being heard, to file his transcript in the federal court and thus give that court jurisdiction. Sure we are that if any could be found our friend would not have failed to produce it, and never would have contented himself with curtly saying "this is a technical quibble." In practice and especially in view of the great increase of our corporate wealth and litigation, and the eagerness, too, with which cases are constantly sought to be removed to the federal courts, it becomes of the very greatest importance that this double method of perplexing and harassing parties should have an end, and that those so *fearful of local prejudice*, should be kept and held to one tribunal or the other. This is not a case, we beg your honors, to keep in mind, where the removal was allowed and where we appealed to the supreme court of the state. In such a case we admit the right of the applicant to take his transcript and proceed in the federal court. On the contrary it was refused, and they appealed (June 30, 1875), and this appeal was pending and was being pressed by them when they took and filed their transcript in the federal court October 9, 1875. The appeal was heard and they were again unsuccessful and have appealed from that judgment to this court (case 260 now before you and here on argument). Suppose they had not appealed from the supreme court of the state to this, can there

be any doubt that the judgment of that court would have been final and conclusively binding upon these parties? If so, then what would be the attitude of this controversy if the applicant for removal, after his appeal to the state court, could go into the federal court and have a hearing resulting adversely to the judgment of the state court? If he could pursue the other remedy *after* his appeal, so he could after it was *determined*, and the judgment of the court of last resort in the state would amount to nothing whatever. It cannot be that after he appeals to the one court of undoubted jurisdiction he can go into another court which has no greater or more exclusive power to determine the question in controversy. And especially so as he has plain remedy by appeal to this court from the judgment of the state appellate tribunal, and thereby all his rights are effectually preserved and all conflict and confusion completely avoided.

Seventh. In answer to our objection that one of the sureties on the bond was an *attorney*, and hence not competent, it is said we made no such objection and that the court had no evidence that he was an attorney. From which we conclude that if we did object, and if the court knew it, the bond would not have been good.

By referring to the record you will find that we *did* object to the security (case 30, folio 188), and that we insisted that the bond was not good because "one of the sureties was an attorney" (folio 382); also folio 201, where it is stated that plaintiff "*shows* that one surety on the bond was an attorney," &c. In the federal court we objected that the security "was neither good nor sufficient" (folio 374). And see our motion to remand, folio 397.

If we could do more to call their attention to this objection and thereby give them an opportunity to amend, we would be glad to be informed. And if we *showed* that one of the sureties was an attorney then there must have been *evidence* of it. But aside from this positive evidence from the record

that one of the sureties was within the class prohibited by the statute, we suppose that the court could and was bound to take judicial notice of who were attorneys; whether the surety was one, such attorney, like all others, being an officer of the court and subject to its cognizance and control. We state the facts and the rule, as to which there can be no dispute, saving our friend from further "homily." Upon the record this point cannot be avoided, and our friend, from his argument, evidently so feels himself.

Eighth. We always aim to be frank and acknowledge an error when brought to our attention. We are, therefore, ready to admit that the point made by us (page 14 of brief), to the effect that the application should have been made at the former term of the court, is not well taken. We had not thought, as we should, of the time of the passage of the act of 1875 in relation to the term at which this case could have been tried. The trial term, as we insisted, was in January, before the passage of the act, and hence it could not be applicable. For once our friend is right, as he often is, if his case will allow, and he does not become too zealous.

The supreme court of Iowa affirmed the decree of the state court rendered May 22, 1875, for this was the only decree from which an appeal was taken. The "corrected, amended and reformed" decree and which was "ordered to stand as the judgment and decree of the court in lieu of that rendered in May" was rendered October 14, 1875 (case 260, folio 189). And it was thus ordered adjudged and decreed on that day (191). From *this* decree there was no appeal, and it stands to this day as the final and conclusive determination of the rights of these parties, a decree which was entered upon the motion of the appellant in that case (Dennison) himself and the correctness of which he has never by appeal or otherwise questioned. The supreme court of Iowa could not affirm a decree not before it, and it does matter, our friend to the contrary not-

withstanding, what it was they were reviewing and what it was of which appellant was complaining. And we call your attention to this feature of this record to show that in case 260 there is nothing for you to review, and more especially that your honors may see the very great impolicy, to say the least, of permitting a party to pursue his remedy in two different tribunals, and the confusion and conflict which must inevitably result therefrom. This case aptly illustrates and demonstrates what we have before suggested upon this subject.

And here we leave the jurisdictional question and come to these cases upon their merits, remarking that your honors, as to this inquiry, have nothing to do with case 260, since if the court below (supreme court of Iowa) was right on the jurisdictional question, you will not, of course, look into the facts nor inquire whether the decree was right or wrong. And then if that case is affirmed as to jurisdiction, by the anomalous course pursued by our friend on the other side, you will have a valid judgment, which must stand whatever may be done with the other cases. To this feature or aspect of these records, we called attention in opening, and here leave it.

II.

MERITS, FACTS AND EQUITIES.

All mortgages found in the record were released, and have nothing to do with the case, except that executed and recorded June 4, 1872. All the dates of this mortgage (the only one upon which appellees can claim any right) are long after *our* contract to do work for the railroad company, after we commenced work, and indeed our work was concluded a short time after the mortgage was executed.

It is not disputed that our lien dated from the time we commenced work, and holds for all work done, whether before or after we had notice of this mortgage. (We had no notice until it was constructively given June 4, 1872.)

But to avoid this lien, the main point of appellees is that the contract under which we performed work especially provides that we were to look to the *citizens of Delaware county for our pay, and had no claim upon the railroad company therefor.*

And here, *imprimis*, we beg to correct our friends when they say (pp. 9 and 10) that though we knew the whole case hinged upon this question, no allusion is made in our statement or brief to this part of the contract. Surely they could not have read what we said. By referring to page 19 of our brief this provision is especially noticed in as apt words as we were able to command. And by consulting our opening argument (pp. 25–28), you will see that we anticipated this point, and devoted not a little space to its consideration. And therefore, though we were not required in strictness to do so, we did call attention to it, cited authorities, and argued it as fully as any other part of the case.

If we understand counsel they do not insist that we took *collateral security* and thereby waived our lien, but their point is that there was a waiver of the right to collect the debt from the railroad company--that no action could be maintained in law or in equity against the company--that it was an agreement absolute and without qualification to take a third party in payment. In a word, that there was nothing for the railroad company to do, for that we agreed to look to a third party for payment. We believe this to be a correct statement of their position on this subject. Let us look at it.

By referring to the contract under which the work for which the lien is claimed was done, you will see that we undertook "in consideration of the prices *agreed to be paid by the said railroad company*" (case 30, folio 44)—that the said *railroad company* agreed to "pay us on the estimates of the engineer, as follows." (48.) (Here follows the prices to be paid for grubbing, earth excavations, timber, plank, iron, ties, &c., folios 49–51.) The *railroad company* was to pay us on

monthly estimates 80 per cent. of the work done, 20 per cent. being retained as damages in case of forfeiture of the contract, the latter sum to be paid within *thirty* days after all work was completed and accepted by the engineers. (51.) All *payments* on estimates were to be made every thirty days at the *office of the president* of the railroad company at Davenport, and the said company could stop all work at any time upon notice without payment of damages. Whenever five consecutive miles were completed and accepted by the engineer the *railroad company was to pay the full amount* of the contract price, without deducting the 20 per cent., and so on for every additional five miles so completed and accepted. (52.) This contract, containing all these provisions as to payment, was signed by the directors of the construction company (plaintiff herein) as of Aug. 6, 1870. After and following these signatures is the language upon which counsel rely to sustain their position, to-wit:

All the money for the work heretofore specified to be paid by the citizens of Delaware county.

H. PRICE,
Pres't Dav. and St. Paul R. R. Co.

(Folio 52.)

By the testimony it appears:

1. That the treasurer of Delaware county collected the tax voted by the citizens to aid in the construction of this road, and paid the same to the defendant railroad company on the order of its president (Holbrook's Ev. folio 449, and exhibits "A" and "B" 453-4).

2. Upon these orders the railroad company was paid by the county treasurer $23,279.03 of the taxes so collected (452 and 455).

3. The construction company (plaintiff), never collected nor claimed the right to collect any money from the citizens of Delaware county, nor was it allowed to do so.

4. No one other than the D. & St. P. Co. could receive

these taxes. Or at least after their collection by the county treasurer, they had to be paid to the railroad company or upon their order. He could not pay it to or upon the order of any other person. (See statute quoted in opening argument.)

5. The R. R. Co., on the work done by us, paid about $70,000.00 out of their own funds, without reference to the amount realized by it from the citizens of Delaware county, and there remained but about $12,000 to collect from the citizens, the collection of $8,000 or $9,000 of which was enjoined leaving over $50,000 of our debt unprovided for. (Folio 499).

6. The taxes voted were collected by authority of the defendant R. R. Co. and all taxes and subscriptions were disbursed under the orders of the officers of that company. (Folio 500, 501 and 505).

7. This company brought all suits to collect subscriptions in Delaware county (probably 40 in all), these suits being commenced within a few months after the work was undertaken by us. (Folio. 504).

8. The collector of the R. R. Co. was directed by it to pay out of the funds collected from the citizens of Delaware county "*belonging to said company*," the expenses of the *collecting agent* and *division engineers* as also for *right of way and expenses for the same.* (Folio 506).

9. It was not claimed by either party that we had anything to do with the collection of this subscription. (Folio 535).

10. The whole amount of tax voted, and individual subscriptions in Delaware county at the time this contract was made, was about $100,000 (folio 532), while the work done by us amounted to near $200,000 (folio 53); thus leaving almost one-half of the work to be paid for otherwise than by said taxes and subscriptions.

11. We set up in our original petition against the R. R. Co., filed in the Delaware circuit court, that a difference of

opinion had arisen between the parties as to this clause and that it was agreed that it should be struck out. This was not denied by their answer, and the judgment in that case is conclusive as against the R. R. Co. at least upon that question. (Folios 22, 87, 90 and 119).

12. The R. R. Co. not being able to pay the estimates as made was compelled to make its note for $5,000 which it afterwards met (folios 109, 110), which is entirely inconsistent with the proposition that we were to look to the citizens for our money.

And now we submit in view of these facts that there is no fair ground for claiming that we agreed "without qualification and absolutely" to take a third party for payment, or that there was "nothing for the R. R. Co. to do." And yet that, as we have seen, is what is now claimed.

In the first place we remark that it is a little remarkable, if our friend is correct, that the contract itself did not contain some provision or agreement *on our part* to take these citizens. And while it contains, as we have seen, numberless provisions, binding the R. R. Co. to pay on estimates every 30 days—to pay in full for each five miles constructed, and all at the office of the president of the company at Davenport, and while too, that company had the power to stop work upon notice, without incurring damages, we say while all this is true not a word is said anywhere by which *we agree or undertake* to look to any other than the R. R. Co. for our pay. And, too, why did not Mr. Price, a man of excellent and even the shrewdest business habits, if this was the intention, provide that the construction company *agreed* and *undertook* to take some other than his company as the responsible party. Nothing of this kind appears however. On the contrary, Mr. Price, manifestly for his own protection, to notify, if not bind (as far as he could), the citizens aforesaid and doubtless to impress them that upon their promptness depended the speedy prosecution of the work, added this provision, which may be all well enough between

his company and these citizens (and especially to inspire and alarm the latter), but in no manner bound us or in the least affected our rights.

The legal affect of the words upon which they rely to show that we agreed to take these citizens "absolutely and without qualification for payment," may be seen by just one inquiry. What privity of contract was there between us and such citizens and upon what principle was it that *we* could proceed to enforce the collection of these taxes and subscriptions? There can be but one answer to this question and this completely and sufficiently answers their claim in this respect.

In the next place, *we never agreed to take these citizens.* There was no *mutuality* in such a contract as they now set up. And this is most abundantly shown, not only by the terms of the contract itself, but by the construction put upon it by the railroad company and all that was done under it. The amount which the railroad company controlled of these taxes and subscriptions, all told, was but about one-half the work done by us. They collected the money by their own officers—ordered it paid to meet their own expenses (engineers, collectors, right of way, etc.)—made their orders from time to time for its disposition, thereby showing beyond all question that they never understood that we were to look "absolutely and without qualification" to these funds or to these citizens for our compensation or pay for our work.

Then, too, having *used this fund* to meet their own wants, neither they nor these trustees can now be heard to say that we must look to that which they have used and placed out of our power to control or collect.

We care not whether the President (Price) would or would not have signed this contract but for this provision. This court has nothing to do with what he thought or intended. The question is, what is the legal effect of this provision? And can a case or rule be found which recognizes the validity of an agreement, such as here set up, where the assignor

retains the control of the debt, and where the assignee is without power to enforce its collection? Suppose we had sued one of these citizens for his subscription, or had demanded payment, and the railroad company had forbidden payment, or through him had in the action contested our right to recover, will it be claimed that we could have enforced the demand, or that the citizens could have safely paid? Does not this court see at once that they (the railroad company) retained such control over this fund, and that in fact the parties so mutually treated it—that it was the property of that company, and that we could not have compelled payments to us. And that, as we understand, is the test of the case in this respect.

And finally, if the claimed assignor has used up this fund for its own purposes—has applied it to the appreciation of the very security claimed by these trustees—and if the property has been further appreciated by our labor and our money, for which we have never been paid, how in morals or law can either be heard to say your lien is lost, because you did not get your pay from the very fund which we have appropriated by our own act to other and different purposes? The mortgage, which it is claimed is a prior lien to ours, was executed long after we commenced work—indeed, when it was almost all performed—made by a party who had used up this fund for its own interests, and as we are bound to presume, with a full knowledge of how it had been applied. The mortgagees knew that we were doing work, and if they knew of this provision in the contract they knew also from the records of the company and the county that the mortgagor was using this very fund for its own purposes, and had appropriated a large portion of it to the payment of other debts. They knew also that we never controlled the fund, or attempted to do so, and that it still remained under the control of the mortgagor. And hence, if by this mortgage, or any other proper instrument, these debts had been assigned to these trustees, there

can remain no doubt that their equities would have been paramount to ours. If so, and as to this we do not see how there can be a doubt, you have in that very illustration, or case supposed, a conclusive answer to the claim here made by the other side.

We need not add that the testimony of Price upon this subject, or as to what he intended, was entirely incompetent and inadmissable. The contract speaks for itself, and in connection with the construction placed upon it by the parties, must be taken as the sole measure of our rights, and their liabilities. (That we objected to this testimony as incompetent, see case 29, folio 773).

A few other words and we leave this point and the case as well.

The suggestion of counsel (p 35) that it is "admitted that all the money paid on this contract was from these subscriptions" is not only not warranted by the page of the record to which he refers (97), but is without support in any single fact or item of evidence in the case. On the contrary as we have shown, they paid us from other sources and used a large part of these funds for other purposes and to meet their other expenses.

It is said (p 40) Doolittle was not a director in the railroad company in 1871, but was treasurer of the Construction Company and that if he did pay various things with the money collected, such as right of way &c., he had no authority to do so, and that this sufficiently answers the thirteenth point of our brief (p 20). And in this connection it is said that he (D.) had no authority to waive any rights under the contract for which he relies upon the testimony of President Price. We merely submit that this is hardly consistent with the action and records of the railroad company found on page 144 (folio 506, case 30), made when Mr. Price was president and by which a portion of this fund was appropriated to the payment of their collectors, right of way, the expense thereof,

and the local engineers. Nor is it any more so with very many parts of the record to which we have referred above.

Many other matters contained in their argument we might notice and meet as conclusively as those above, both by the record and the law. But having anticipated most, if not all, of them in opening — and submitting that counsel is either not familiar with this record, or is conscious of his inability to meet successfully the main facts in controversy—with an humble prayer that we may be excused from trespassing so long upon your time, we now leave the cause of our clients, so long postponed their just rights, in your hands.

GEO. G. WRIGHT AND
JNO. M. BRAYTON,
for Appellants in 29 and 30,
and Appellees in 260.

FURTHER ARGUMENT.

Since the foregoing was printed we have been furnished the very elaborate argument of Messrs. Evarts, Southmayd, and Choate, which by reason of its extraordinary positions demands at our hands some further suggestions.

JURISDICTION.

I.

It is claimed on the other side that the removal takes place without any action or knowledge thereof on the part of the State court, that the Act of 1875 has expressly taken away the right of that court to pass upon the sufficiency of either bond or petition. (Arg., pages 11 and 12.)

This most monstrous and extraordinary doctrine we deny.

a. Certain it is this court has never so held. On the contrary one of its latest opinions uses language in the most perfect harmony with our view. We refer to Vose *vs.* Yulee.

See also Railway Co. *vs.* Ramsey, 22 Wall., 328, and Marshall's opinion in Gordon *vs.* Longest, 16 Pet., page 103.

b. While detached sentences may be found in inferior courts, which might seem to teach what counsel claim, yet when examined it will be found that what is meant and said is "when the law is complied with," "when a party brings himself within the law," "when a sufficient petition and bond are filed;" in such and like cases it is the duty of the court to proceed no further.

c. The doctrine contended for is an insult to the States and their judiciary, and magnifies beyond all necessity the rights and powers of Federal tribunals.

d. It is at war with the alphabet rights and powers of the smallest and most inferior courts of the land. For it will not be denied that the State court had rightful cognizance of the case, nor unless challenged that its jurisdiction is just as ample as that of the Federal court. Nor is it to be denied that the right of one party to remain is just as complete as that of the

other to remove. To say therefore that a jurisdiction thus invoked, thus ample and complete, can at the mere will of *one party*, by filing a paper and bond, however defective in form or substance, and against the protest of the other, be ousted and put an end to, mocks at all just ideas of judicial procedure, and makes a State court a clerks office, the judge the most insignificant cypher, with less power over his records or proceedings than the smallest justice of the peace in the most remote parts of our newest Territory.

e. Under some circumstances, by statutory regulation, a party may *dismiss* his case without judicial action or direction. But under no system in any of the States or elsewhere can you find warrant for the transfer of a case from one tribunal to the other, in the absence of agreement, without the order or sanction of the court where pending.

f. Orderly methods require this, for if action on the part of the State court is unnecessary, then the case by the record is pending there still without anything to show its removal or disposition. And thus the case would be in another jurisdiction without order, without the knowledge of the court, and the record ever silent upon the subject.

g. Why require a petition or bond to be filed at all if the court is powerless to act in the premises? Why not give to a citizen who claims that conditions obtain to warrant a removal the right to take his transcript and file it in the Federal court and notify his adversary accordingly?

h. The very fact that the petition and bond must be filed in the State court carries with it the necessity of action by that court. For to require a party to do something in a tribunal which is to remain blind and deaf to what is done is a legal and logical absurdity.

i. The question we are now considering is that of power or right to *look into or pass upon the petition and bond* and not the *extent* of *such power* or right. For admitting that when the law is complied with the court can proceed no further, this

by no means carries with it the further proposition that if the law is *not* complied with further proceedings are just as effectually stopped. And yet our friends insist that it makes no difference whether the law is complied with or not, the State court is by this act stripped of all power to inquire into the sufficiency of the application, and the case is transferred the moment the party asks it and files a bond.

j. It is no answer to our view to say that the petition may be filed in *vacation*; for in most of the states the judges may act upon these and like matters out of term. Not only so, it is made "the duty of the State court to *accept* said petition and bond" thereby implying and necessarily showing that whenever filed whether "before or at the term at which the cause could be first tried" action upon the part of the court in *accepting* the petition and bond is a part of the work and machinery of removal.

k. If counsel are right then there is not a case pending in any State court which could not be removed upon the application of a party who is either corrupt, or wanting time, or for any reason proposes to harrass and perplex his adversary. Illustrations:

1. He states "legal prejudice," but does not verify it.

2. He alleges "difference of citizenship," without verification of course, and hence incurs no penalty when he, the court, and every man in the county knows he states a falsehood.

3. He gives a bond with straw bail, or signs it himself without surety, and says that complies with the law.

4. His petition says nothing about the amount in controversy—about citizenship—is filed after the term at which the case could be first tried, is in a case which upon its face shows that there is no right of removal, is filed after the trial has commenced.

And yet the rule contended for is that in all these and like cases (and many others might be mentioned) the State court cannot look at the petition or bond, but whenever they are filed, *jurisdiction is at an end*, though they utterly fail to comply with the law.

If this is true, then it would be as much a duty to stop if the petition and bond were filed *after the trial had progressed for days, and even about concluding*, for the court has no more power to determine whether *the application is too late* than it has to pass upon the *sufficiency of the bond or petition.*

l. If the removal takes place without any act or knowledge of the State court, then anything done in the case after a bond and petition are filed *is void*, and that, too, though the papers filed make but the merest pretence of complying with the law.

The consequences to result from the inevitable confusion and conflict to follow all such cases will occur to your Honors at once.

m. The jurisdiction of the Federal courts on all matters is limited. Whatever its original jurisdiction, in removal cases its power to act depends upon the legislation which confers the jurisdiction. Aud this it must get by such method and in the manner provided by legislation. It cannot take within its grasp anything or in any manner save as the law gives it to it.

n. The language of the act of 1875, as to the duty of the court, is not essentially different from the prior ones. In each it is made the "duty of the court to accept (the surety in one case, and said petition and bond in the other) and proceed no further."

It follows, therefore, that decisions under former acts as to the powers and duties of the State courts are applicable here. And certainly this court will not need authorities to show that from the foundation of our Government, in all the history of Federal jurisprudence, a duty devolved upon the State courts, and that there was something for them to decide and determine.

o. If it is to be held that these removals take place without any action or knowledge of the State courts, then no heavier blow could be struck at the integrity of the States—the independence of its judiciary—nothing could be done to lnad more

inevitably to a deplored centralization. Such a construction implies and carries with it distrust of the honesty of the State courts, argues that judicial power can only properly be entrusted to Federal courts, and that the local tribunals are so many nets from which every suitor should escape at his own will and pleasure.

Few things could be done which would more certainly bring conflict between the States and the Government. And finally, if this doctrine is to obtain, then the business of the State courts can be interfered with and tied up to an extent next to impossible to measure, and the time of our Federal courts, instead of being given to matters properly before them, will be lost in looking into records and deciding questions which can safely be left in the first instance with the local courts. Practically no rule more vicious could well be adopted.

It there be those who have an ambition and pride to show their briefs in other than State courts, let not their ambition be gratified at the sacrifice of what is due to the State and its judiciary, and at the hazard, too, of snowing under our Federal courts with needlees and unwarranted removals.

II.

It is said that the act of 1875 intended to remove all questions of right to transfer from the State to the Federal tribunals, and that when a case gets into the latter court all irregularities become immaterial if that court can see it is one over which it has jurisdiction. This is but a part of the proposition just discussed, and, perhaps, but a fair deduction from it.

And yet this court has said that the *State court was not bound to surrender its jurisdiction until a case is made which, upon its face, gives the applicant a right to the transfer.* (Yulee *vs.* Vose.)

2. The 5th section of this act giving the Federal court the power to remand, &c., when the case does not really, &c., involve a dispute, &c., properly within its jurisdiction, does not make it any less the duty of that court to inquire into the method by which the case gets into the court. For if in this

we are wrong, then in a case *commenced* in that court it could only *dismiss* upon the ground stated, without power to inquire into the regularity of the proceedings, whether in writ, service, declaration, or other part.

3. The Federal court obtains jurisdiction in two ways—by *original process* and by *removal from the State courts*. And as the power given to *dismiss* in the section referred to for the causes stated would not warrant the argument that in cases brought there originally there is no right to look or inquire into the jurisdictional methods by which the power was invoked. Neither in *removal cases* can it with any more force be insisted that it must retain the case if it is one within its jurisdiction, whatever the irregularities and insufficient methods adopted for getting it there.

4. This section has nothing to do with the question before us. It merely gives the court the power at any time to remand or dismiss if the requisite facts appear. But suppose a party should file a record from a State court without ever having filed a petition or bond, would it be claimed that if he should show the requisite citizenship and file a bond that the court would retain it? And yet that is the argument.

We here remind the court that *no proof of citizenship of applicant's was made in either State or Federal court.*

5. It is only parties *entitled* to remove who can make the claim. And whether so entitled depends upon the *sufficiency of the application* when it is made, and not as it may be patched up afterward. The same court may allow an amendment of its process or writ, but another court cannot. And if the petition and bond are not sufficient to end the jurisdiction of a court indisputably having it, another, foreign and independent court cannot gain the jurisdiction by allowing amendments, or by saying "well a case might have been made we will therefore treat it as done and retain the case."

6. Cases are not wanting where the federal courts have remanded cases because of so-called *irregularities* without inquiring whether in fact they were within their cognizance. Of this class is Burdick *vs.* Hale, 6 Bliss, 97, and others might be cited.

III.

It is insisted that we cannot be heard to urge any objection to the papers filed for removal except those stated at the time, that all others are to be deemed waved.

In answer we say.

1. That by referring to the objections taken in the court below and in our motions to dismiss and to remand you will find every objection stated, which we have deemed it necessary to discuss or which arose upon the record. This point we noticed in reply to the other argument and do not care to follow it further except to say.

2. That if there was no sufficient bond or petiton, or if there was not the requisite difference of citizenship, or the like, then the objection would be fatal at any stage, as the court "will not take jurisdiction over the paities *unless it is apparent upon the face of the proceedings*" story Eq. Pl. ss 492; and

3. Your honors have the judgment of the local and State Supreme Court refusing this removal. If upon any ground, whether that stated by the latter court, refered to by us, or upon any other, the jurisdiction was not ousted, this court must so hold for it is a question of jurisdictional right and not of failure to put objections to a proceeding upon one ground rather than another.

And here let us suggest, once for all, that it is a novel method of argument found in the one we are now considering by which it is insisted that because we done certain things in one case we therefore waived rights in another. In other words they say because we plead so and so in one of three cases, or entitled a pleading in a certain manner in another and the like we are thereby estopped from claiming or insisting upon certain objections in still another. We had innocently supposed that those cases must each stand upon its own record and be decided accordingly, except so far as the pleadings and proofs in one set up and show the proceedings in the other, and they thus come properly before the court.

Whether we waived anything by what we plead, admitted or

otherwise in such case, we have heretofore noticed and shall say no more.

IV.

In answer to our specific objections to the steps taken for removal, it is said:

1. That the *statute* does not require the petition to be *signed*. With not a little apparent reluctance it is admitted it must be *in writing* (or print), but it is denied that it need be signed. And this because the only object of signing is to *identify* the paper, and as this *was identified*, every purpose was answered, (Aug. 19.) And then they say that as the bond was signed by the attorney of the petitioners, this is sufficient to show a signature to the petition.

Now remember that in our view of the record, (and as we insist the conclusive view, for it is found in the bill of exceptions signed by the judge, folio 107, case 260,) they did not rely on this so-called petition and bond, for after they had announced themselves *ready for trial*, and the trial had commenced, they "*asked leave to file a motion and bond for change to U. S. court.*" And look at what follows in these exceptions and you will find that nothing was said about a petition or bond then on file, thereby showing most conclusively that they placed no reliance whatever upon them.

But suppose you refer to the record entry (which we repeat is not as high evidence of what took place as the exceptions) and you will find that they asked "*leave* to file an *amended petition and bond for removal*," (folio 108, case 260,) and the same thing appears on the so-called amended decree, (folio 190, same case.) From which we insist that they never relied upon the petition and bond, until the court, in the exercise of its discretions, refused leave to amend—a discretion which neither this nor the circuit court of the United States has or had the right to review or correct.

But we will not argue the proposition that a petition *to be a petition* must be *signed*. Counsel may indulge in nice speculations, and refine upon the purposes of the statute, but the bald

and cardinal fact remains that that there was *no petition* within the meaning of that word, either in law, or to the understanding of the common mind, and *that is all there is of it.*

V.

As to the bond it is said that if the Iowa statute prohibiting an attorney to sign a bond governs it is no matter, since he *had signed* in this instance, and it was too late to object; and further since the statute does not require *two sureties*, if the other, not within the prohibited class, was good the law was met.

In answer we say that if the first part of the proposition is true, then the statutory prohibition would be of little avail, since an attorney could easily sign his name to these undertakings; but the bond does not have force until it is *accepted.* Then to do that which the law prohibits is an act in itself void. And as to the second, we answer that here was a *joint* as well as *several* undertaking, and if the bond was not to be accepted because of this defect, then it bound no one, and was in no sense a good or sufficient undertaking.

As to the application of the Iowa statute to such cases we only suggest that it is *general*, refers to *all undertakings* in court, it is not a rule for *removal bonds* alone, but for all.

The statute of the United States requires a *sufficient* bond. That bond has to be *filed in and accepted by a State court*, and the same *general* rule of responsibility or incapacity which is required in or attaches to other undertakings in that court, must properly be applied to this. The statute is not in conflict with any law of the United States or any rule of her courts, and we insist that if it was not so declared in Iowa, this court would not hold that the court acted improperly in refusing an attorney in a case or of the court to become surety on such a bond.

VI.

The argument we are now considering insists that the removal was asked "on the ground of different citizenship, and on that alone," (57,) the other because not verified being surplusage.

The argument heretofore made by Judge Grant claimed that there were *two* grounds stated, "local prejudice" and "different citizenship," (28,) which is right we leave them to determine. We think the judge is mistaken and his colleague right, except that the only ground stated is "local prejudice," and this for reasons fully argued (and not answered by them) in our opening and first argument in reply.

They say that our positions on this head "do not seem to call for argument." That may be, but it would have been so easy for them to have at least made an effort in that direction that we confess we regret they did not add a little to our sum of happiness by saying a few words on the subject.

The truth is that it is plain to the dullest mind that these applicants either did not know what they were doing or were trifling with the court.

They answered and amended and still kept amending, each time defectively. They sought to make Meyer a party without any evidence that he was any other than an intruder. They handed to the clerk a paper called a petition so blind that counsel cannot agree as to its meaning, unsigned, unverified, indefinite, and which they *ignored* after the trial had commenced by asking leave to file a bond and petition. They asked to continue the case after handing the paper to the clerk, and yet after all this, and all the patience exercised by a most painstaking and able judge, they come here and talk about our "tricks," "fruitless quibbles of the smallest kind," "nimbleness and sleight of hand," and of the disposition and determination of the State court to hold the case and deny them their just rights. We pass by what they say of plaintiff's counsel, but must again, as we have before, enter our solemn protest against their abuse of a most competent State officer, merely because he finally felt compelled to do something with the case in the face of their manifest efforts to get delay and postpone the payment of what is admitted on all hands to be an honest debt. [And that it must at least be paid and out of this property it is evident, the counsel whose argument we are now considering are ready to admit from the whole tenor of their argument.]

VII.

In all that is said as to *waiver* thay seem, if no more, to misapprehend our position. We have nothing to do with the effect of acts done by a party in a state court after his attempted removal, such action being forced upon him by the adverse party.

We are now dealing with the effect of his own act after the alleged filing of a petition and *his own action* in the State court after the refusal to remove.

A party files a paper double in meaning, unverified and unsigned without notice to court or adverse party, then asks a continuance, then files two amendments at least, announces himself ready for trial, the trial commences, then without relying upon the paper filed asks "leave to file a motion, &c., for removal," is overruled, appeals to the State supreme court, is heard there and at the same time invokes action in the Federal court. Now we say that by his acts prior to the order refusing the removal he waved any possible right based upon this extraordinary paper. And that by appealing to the Supreme Court of the State he waived his right to go to the Federal. And we have heretofore defied and again defy our friends to find a case where this has been recognized or held to be proper. What this court ought to and we trust will hold in this class of cases is:

1. That whether the party has complied with the law in his application is to be determined in the first instance by the local court.

2. If he has and the application is refused let him go to the Federal court and ask process fully within its control to bring the record before it.

3. If he does meet the demands of the statute, as all further proceedings should then stop, he is in no danger for the jurisdiction ceases. Not so, however, if he falls short of the law.

4. Let the party pursue his remedy in one tribunal or the other, State or Federal, and if he selects the former he should be held to it and be estopped from resorting to the other.

This would keep intact the autonomy of the States and their

courts, give ample opportunity for the redress of grievances, and would also avoid conflicts, confusion and difficulty, as well as complaints, the justice of which no one can deny.

No right-thinking citizen objects to the exercise by the Federal courts of all the power which may be given them by Congress within constitutional limits; but it is objected that jurisdiction should be taken by mere intendment; that State courts should be completely ignored, and insisted that this process of absorption, so much desired by some, shall have an end and that parties shall, save in cases clearly within the purpose of the Constitution, be left to be heard and have their rights settled by home or local tribunals.

VIII.

We shall not add to what we have said in former arguments as to the effect of joining Meyer with Dennison in the application to remove. Meyer was not a *party to the record, and in the local court there was no evidence whatever that he had any right to be made such.*

It matters not what he showed, what we admitted, or what the proof established in the case commenced in the Federal court. In the other cases (30 and 260, those in which the jurisdictional question arises,) he was not a party when the removal was asked, and he had no right to join in the petition, nor to come to this court in 260, as he does without ever having appealed to the Supreme Court. And yet this is the bungling manner in which they sought to oust State jurisdiction and to revise the action of the State courts.

IX.

It is said that we took judgment against the Railroad Company; that the case or suit was thereby at an end as to it; that we severed our action and that the controversy was wholly between the trustees and plaintiff. In this way counsel attempt to drop all question of parties under the statute, conscious as they evidently are, notwithstanding the bold position taken by their associate (Judge Grant) that if these were not with them the Federal court was without jurisdiction.

Under this head they make some statements claimed to be based upon the record, which it is important to correct.

1. The case was not at an end by the decree of February 6, 1874, as to all parties, except these trustees. The case was continued as to all parties, except the Davenport and St. Paul Railroad Company (folio 66), such other defendants being the trustees, Davenport Construction Company and Howard.

2. The supplemental petition was based upon the original, and while unnecessary, it asked no other, further or different relief from that prayed in the original.

3. The sale under execution did not satisfy the judgment. The return upon the writ shows that it was only "partially satisfied," (folio 77, case 260.)

4. To treat the case as if we had commenced a new and independent action against these trustees—to cut off their equities is neither warranted nor fair.

They were parties to the original bill. The case was continued as to them as well as others, and they were brought in by publication. The case or suit was an entirety, and by the decree of February 6, the rights and liabilities of the other parties were all left open to be settled when all should be before the court. By the decree of May 22, 1874, (folio 80, &c., case 260,) our equities were established as against the trustees and the Davenport Construction Company. Still the case was entire. There was no new action or suit. In this stage of the case these petitioners, citizens as they claim of New York, but co-defendants with the Davenport and St. Paul Railroad Company and the Davenport Construction Company, both citizens of Iowa, ask to remove the case as to themselves, and say they can do so because the case was at an *end as to the railroad company*, if not as to all other co-defendants.

Now what is a suit or case within the meaning of the Constitution and the removal acts? When does the suit end? We say not until execution executed as to all parties. "The legal sense of the word adhers to the case after the rendition of the judgment, and it has been so decided. See Wayman *vs.* Southard, 10 Wheaton, 30.

The word case includes all suits, criminal as well as civil. Controversy does not include criminal cases, and it is in this sense the Constitution uses the term

Now to illustrate by this case. Suppose these trustees to have removed the case, and the railroad company or construction company (co-defendants) had, as they might under the statute within two years, applied for a new trial. And tell us where the case would be. In the Federal or State court? If in the former, will counsel tell us how the case got there? Of course it went with the removal proceedings if at all, and it could not well be otherwise, since it is the *suit* and not a branch of it which is to be and can only be removed. And if so, then these parties were still co-defendants in the suit, and without them the controversy could not be fully settled. Now we will not say if one lien holder should commence an action against another to foreclose his equities, without including the common debtor, that this would not present a controversy wholly between them within the meaning of the act. Just as if suit should be brought against one of several promisors, if the requisite difference of citizenship obtained, there might be a removal, though all the other promisors, not joined, were citizens of the same State with plaintiff.

If, however, all were sued, there could not in such a case be a controversy between plaintiff and any one of the defendants, whatever his citizenship, which would warrant a removal. And this is true, though the matter had passed to judgment as to all but the one defendant. The *suit* would not be ended. The controversy (or suit) must be wholly between citizens of different States, such as can be fully determined *as between them*, and then it is that one or more (without joining all) may remove and not otherwise.

We have nothing to do with cases where nominal parties are joined. The books are full of cases of this character, and counsel deduce from them rules not warranted by the statute. And, indeed, these cases have lead to not a little of the confusion and trouble supposed to surround this statute.

Take the case, however, where all the parties are necessary

to the settlement of the case, suit, or controversy, part of the defendants having a common citizenship with the plaintiff in the State where the suit is brought, and a co-defendant, though his citizenship is different, has no right to remove. But time forbids further elaboration upon this point.

[It is said that Meyer was not bound by the decree, though Dennison may have been. Answer: he claims, as the successor of Thompson, the decree of May 22, 1874, *was against Thompson and Dennison, and this concludes Meyer.*]

And now your honors we claim—

1. That there was no petition filed in time.

2. That the paper was not a petition.

3. That if signed it was not sufficient; that it stated as the only cause for removal, "local prejudice," and is not verified.

4. It was insufficient in that it did not state the citizenship of these petitioners *at the time* the suit was brought, nor was there any evidence of the citizenship of either Meyer or Dennison.

5. It was not suggested or treated as a petition by the applicants themselves.

6. It was called to the attention of the court *too late*, and when so called it was not relied upon.

7. It was defective in that it was made by two parties, one not then nor at any time in that court a defendant.

8. It was waived by amending, moving for a continuance, and going to trial without objection.

9. The bond was defective.

10. By appealing to the Supreme Court of the State they estopped themselves from going to the Federal court.

11. By appealing to the Supreme Court from a decree which was afterward on their motion set aside, a new one entered, which remains undisturbed in no manner vacated; there was nothing before that court, and the undisturbed decree is absolutely binding and concludes all the parties to it.

12. The applicants had no right to remove the case, for it was not within the cognizance of the Federal court.

MERITS.

A word (and we cannot for want of time do more) as to the merits, and we leave the case as we hope finally.

1. It is manifest that counsel do not greatly admire the Iowa statute which gives the mechanic a lien for work done under a contract made before a mortgage upon the same property, though much or little of it may be performed after. But this is the law, well settled and repeatedly recognized, and it is in the most perfect accord with justice and right.

They talk about our *secret lien*. Why it was a vast deal more public and notorious than the constructive notice afforded by recording a mortgage. When they took their mortgage we had hundreds of men along the line of this road, were expending many hundred, if not thousand dollars per day. This they could see and know, and know too that for this we were to be paid. They knew also that we were by this expenditure adding to the value of their security. Of all this they had notice and were bound to govern themselves accordingly.

They attempt on pages 75–6 to make a case of equitable assignment. To do so they quite shrewdly endeavor to mix the relation of Doolittle *as the treasurer of the railroad company* with plaintiff. Now look at the Exhibits A and B (30, folio 453–4) and you will see that the order upon the treasurer of Delaware county, was to pay Doolittle *as assistant treasurer of the Davenport and St. Paul Railroad Company.* How an order from a debtor to pay money to itself or its agent can be held to be an equitable assignment of the money to its creditor passes our comprehension. This, however, serves to show the straits to which they are driven. Add to this that he collected the money and disbursed the same upon the order of the railroad company, paying salaries, traveling expenses, for right of way, &c., and you will see still more clearly that there was not only no assignment, equitable or otherwise, which we could enforce, but that the railroad company by every act treated these funds as under its own control, subject to be expended and paid as it might direct.

The company in all transactions with Doolittle treated him as its agent and officer, and neither by his act, that of the company, nor that of plaintiff's was this fund ever under our control or subject to our dominion.

We have examined, with all the care time would allow, so much of the argument we are considering as relates to the claim that we took the citizens of Delaware county *in payment for our work*, or that we took taxes and subscriptions as *collateral security*, and do not find therein anything new or that needs answer beyond what we have before said.

We do not care to pursue it.

As to the effect of the annulment of the provision added by the President we add a word:

Of course this agreement had nothing to do nor could it in any wise effect what had been paid, whether realized by the railroad company from this fund or any other.

The agreement was simply this:

The parties disagreed, and there was controversy as to whether the words added by Price were ever a part of the contract.

This controversy continued for some time, and finally, to settle the dispute or their respective claims, we deducted two thousand dollars from our demand, and the railroad company no longer insisted upon its construction of the contract.

[It has been suggested that we never made this deduction. From the record (30, folio 54,) you will see that the referee in his report allowed this credit, and this was confirmed by the court in the decree of February 6, 1874.]

This was perfectly competent. It made no change in the relations or liabilities of the parties. There was no giving up of a security, nor the surrender of a third person's liability to pay. And it really made no difference whether this agreement was consummated before or after the execution of the mortgage.

But as it was agreed and in all respects completed before, though not formally entered of record until afterwards, it would be fully binding and conclusive. And here we beg

leave to call your attention to the fact that the President had authority to make the change without the action of the Board, (30, folio 401,) and that by the same record (folios 526, 529, 530, 532, 533, 535) you will see that the railroad company by French, its President, did, on the *third of June*, 1872, consent to this change. It matters not that this agreement was not made of record until after that date.

But without adding more, and referring to our former argument, we submit that if the local court had jurisdiction, then all this talk about the meaning of the contract is unnecessary.

Dennison, the surviving trustee, was in court, was a party, had a hearing, and by the judgment of the court all these questions were settled. So long as that judgment stands, this court is powerless between these parties and their privies to determine what the contract did or did not mean, and all questions of collateral security is at an end.

Our acute friends attempted to get the whole case and property into the Federal court, and to argue therefrom that the judgment was void. The record shows that this property was sold under the judgment May 4, 1874. That Meyer did not commence his action in the Federal court until May 4, 1875. That the Davenport and St. Paul Company was served therein May 7 and we in May 24 of the same year.

Our original judgment was rendered February 6, 1874, and that against Dennison and Thompson, May 22, 1874. So that long before anything was done in the Federal court, the State court had jurisdiction, had rendered judgment, and the property had been sold. What there was about all this which can be regarded as violating the rights of the Federal courts in a case of which we knew nothing, and which the local court could not know, we cannot conceive. And especially so as all that was done in the local court after May 22, 1874, was upon the motion and at the instance of Dennison, representing the bondholders, and if any one was in contempt of Federal authority it was this trustee, (and perhaps Meyer also.)

It is said that the Delaware Railroad Company cannot be

protected, because it is not an innocent purchaser. We have before shown, and the record fully established that it paid a full and valuable consideration for the property. It was a new and independent organization, composed in part only of the members of the old construction company, with four other new members added. The equity of the trustees was cut off May 22, 1874, and this railroad company took title January 19, 1875. This was before the trustees asked for a new trial and while the decree cutting off their rights was in full force. They talk about the company having notice and buying with notice. Of what did it have notice? We answer of just what the record disclosed—a judgment, a sale—a foreclosure of the equity of redemption of all parties to the record, including Thompson, the predecessor of Meyer, who was in life when the decree of May 22, 1874, was rendered, (and for aught that the record disclosed was still alive,) and that said judgment was still undisturbed and unquestioned. This and no more was the notice it had. And while persons served, as these trustees were, by publication, have the right under the Iowa statute to claim a new trial within two years after judgment, we insist that under the same statute this company was protected in their purchase, and that the granting of a new trial did not and could not affect their rights.

One word more. It is quite manifest that our friends are conscious of the strength of our case, for they close by begging that this court will at least allow them to redeem from the sale. And in this connection they discourse for pages of the great injustice and wrong done their clients, and of their rights being cut off without opportunity to be heard.

To all of which we answer that this sale took place May 4, 1874, and they had a full year within which to redeem. They appeared and asked a new trial, and were granted it January 26, 1875, or more than three months before the expiration of the redemption time

We paid some $3,000 in June, 1875, to redeem a part of this property from an execution sale in favor of Westphal & Hines, whose lien was paramount to ours, (29, folio 404.)

And under the redemption we, by the laws of Iowa, have a good and valid title to the portion so purchased.

And notwithstanding the effort of counsel to show that the price paid by us for purchase and redemption was grossly inadequate, it will be found that we paid all the property was then worth, and if not, they had full time and opportunity to redeem and would not. Would they deprive us of the *property*, of all our *money*, including that paid for *redemption*? This it seems is their purpose.

Then, too, they do not by their bill make a case entitling them to this relief. To grant it this court must ignore and override the judgment of a State court of competent jurisdiction, with no other basis for it than the complaint of counsel that their client's case is a hard one. If the complaint was granted, they have but themselves to blame.

And now begging that your Honors will not forget that there is no evidence that *any money* was *ever advanced* on this mortgage; that Meyer had any *right or interest* in the property; that a mortgage right even would not *entitle them to one title*; that not the least of the strange things found in this record is that part of the decree below which requires us to *thus convey*, without any regard to our right to redeem, we say remembering these things, and passing over many other matters, we again leave these cases in your hands.

GEO. G. WRIGHT AND
JNO. M. BRAYTON,
Solicitors.

GEO. G. WRIGHT,
Of Counsel.